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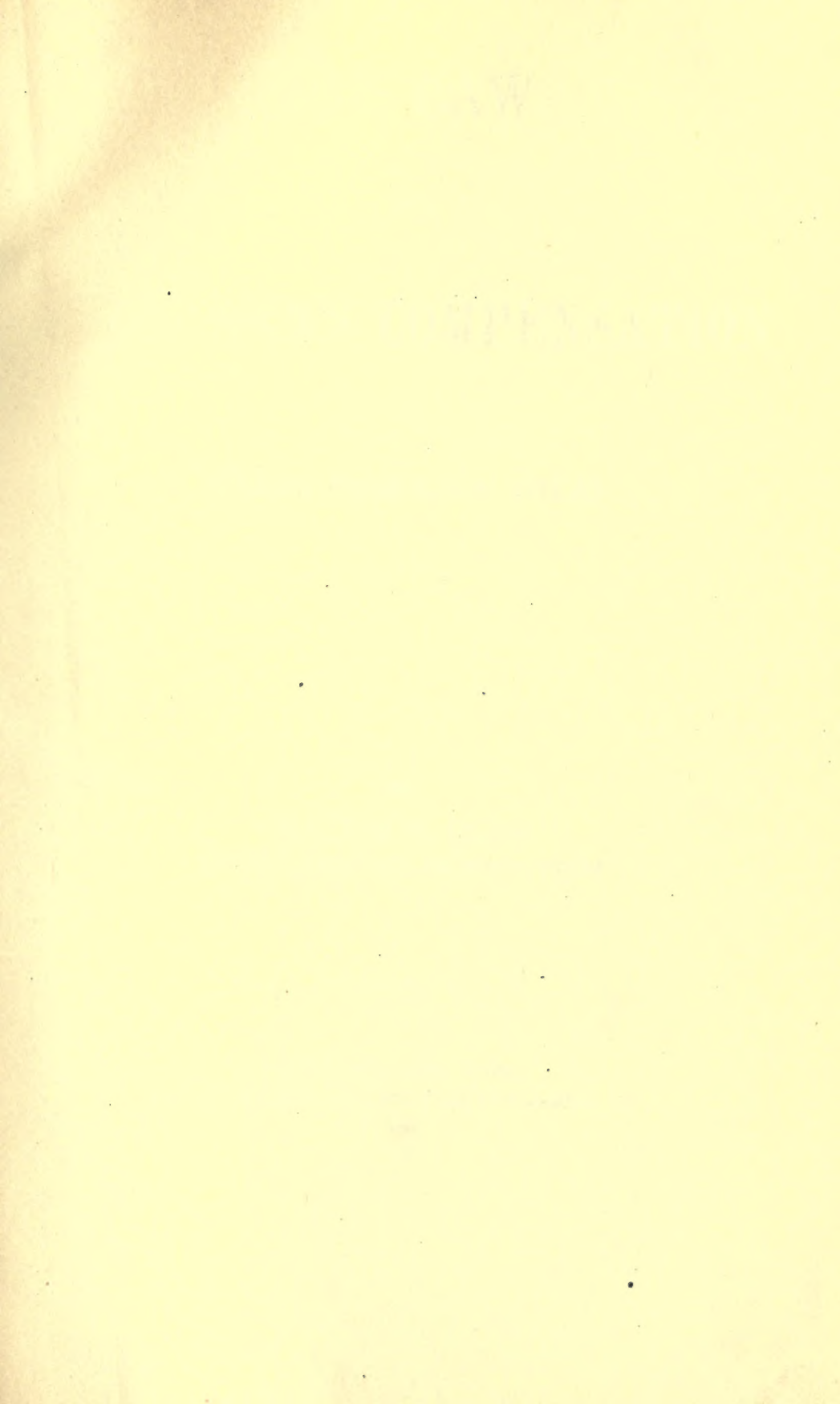






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THE LAW  
OF  
WORKMEN'S COMPENSATION

[TAKEN FROM L.R.A. 1916 A]

BY  
WALTER M. GLASS  
OF THE PUBLISHERS EDITORIAL STAFF

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## PREFACE.

The rapid spread of the workmen's compensation laws in this country has seemed revolutionary to many people. Yet they have been in force in Europe for over a quarter of a century, and in England since 1897. The first American statute of this kind was in 1910, and that was held invalid. The next one was in 1911. Yet such laws are now in force in half the states of this country and rapidly spreading, while about 350 judicial decisions have already been rendered upon them. Indeed, nothing so revolutionary in its effect upon the rights and liabilities of so vast a number of American citizens has ever been known in American legislation as that which has been caused by the adoption of the modern workmen's compensation acts. It has become imperative to have an adequate treatment of the existing law on these matters, and this volume is offered to meet that need.

Many distinctive features of the American statutes are taken literally from the English act, or closely modeled thereon, and therefore our own courts have had to go to the English decisions for precedents in many of the most important American cases. There are about 2,000 of these English decisions, and these, together with all American cases, have been carefully analyzed, and all their value fully presented in this work.

There is also a Federal statute on this subject, but it is limited to employees of the Federal government, and no cases under it have yet been passed upon by the courts.

This treatise was prepared primarily for use as one of the annotations in the Lawyers Reports Annotated, and appears in the current volume, L.R.A.1916A. This explains the frequent use of the word "annotation;" also several very slight changes in form and arrangement deemed more appropriate to the style of a text-book. One of these is in the form of printing the table of contents; another is in the running titles or top lines on the pages. The third of these is in transferring the first 23 pages of the L.R.A. volume preceding the text of the present treatise, and on which were printed the reports of some leading cases, to the end of this volume, with new page numbers, but retaining the former page numbers 1-23 in brackets. An index and a table of cases reported and cited in this volume have also been added. In other respects this entire treatise on workmen's compensation laws, followed by over forty of the leading Ameri-

can decisions on this subject reported in full, with some special text annotation, is exactly reproduced from the L.R.A. volume without any change in type or otherwise. To those not familiar with that series of reports, it may be proper to say that this work is an example of what L.R.A. is doing for all branches of the law. But L.R.A. subscribers should not purchase this volume, because they already have the entire work in their reports.

We may also be permitted to call attention to the compactness of this volume, and to the fact that, if printed in the style of ordinary text-books, it would fill more than a thousand pages.

Rochester, N. Y., 1916.



# CONTENTS.

## Part A. Introductory, 27.

I. Introduction and scope .....	27
---------------------------------	----

## Part B. English and Colonial decisions, 28.

II. In general .....	28
III. Application of the statute generally (§ 1) .....	29
a. Text of § 1 .....	29
b. "Injury by accident" (§ 1, subsec. 1) .....	29
c. "Arising out of and in the course of the employment" (§ 1, subsec. 1) .....	40
d. Disabled "from earning full wages" (§ 1, subsec. 2 (a)) .....	72
e. Alternative remedies open to workmen or dependents (§ 1, subsec. 2 (b)) .....	72
f. "Serious and wilful misconduct" of workman (§ 1, subsec. 2 (c)) .....	75
g. Arbitration for settlement of disputes (§1, subsec. 3) ....	79
h. Recovery of compensation where action for damages has failed (§ 1, subsec. 4) .....	81
IV. Notice of the accident and claim for compensation (§ 2) .....	83
a. Text of § 2 .....	83
b. In general .....	83
c. Form and contents of notice .....	84
d. To whom notice may be given .....	85
e. Claim for compensation .....	85
f. Time within which claim must be made .....	86
g. Employer "prejudiced in his defense" .....	86
h. Excuses for not giving notice or making claim in time ....	89
V. Substitution of scheme approved by friendly society for provisions of the act (§ 3) .....	93
a. Text of § 3 .....	93
b. Construction of this section .....	94
VI. Liability to servants of contractors (§ 4) .....	95
a. Text of § 4 .....	95
b. In general .....	95
c. "In the course of or for the purposes of" the principal's "trade or business" .....	96
d. Work "undertaken by the principal" .....	97
e. "Premises on which the principal has undertaken to execute the work" .....	97
f. Work "ancillary or incidental" to the trade or business of the principal .....	97
VII. Bankruptcy or winding up of employer under contract with insurers (§ 5) .....	98
a. Text of § 5 .....	98
b. Proceedings under this section .....	99

<b>VIII. Liability of third person whose negligence causes the injury</b>	
( <b>\$ 6</b> )	100
a. Text of <b>\$ 6</b>	100
b. Joint liability of employer and third person	101
c. Employer's right to indemnity from third person	102
<b>IX. Application to workmen in the sea service (<b>\$ 7</b>)</b>	103
a. Text of <b>\$ 7</b>	103
b. Proceedings under this section in general	104
c. Persons in sea service excluded from <b>\$ 7</b> ( <b>\$ 7</b> , subsec. 2)	105
<b>X. Compensation for industrial diseases (<b>\$ 8</b>, sched. III.)</b>	106
a. Text of act relative thereto	106
1. Text of <b>\$ 8</b>	106
2. Text of third schedule	108
b. In general	108
c. Meaning of phrase "at or immediately before"	109
d. Presumption as to cause of disease	109
e. Contribution by other employers	109
f. Functions of certifying surgeons and medical referees	110
<b>XI. Application to workmen under the Crown (<b>\$ 9</b>)</b>	111
a. Text of <b>\$ 9</b>	111
<b>XII. Appointment and remuneration or arbitrators and medical referees (<b>\$ 10</b>)</b>	111
a. Text of <b>\$ 10</b>	111
<b>XIII. Detention of ships whose owners are liable for compensation (<b>\$ 11</b>)</b>	111
a. Text of <b>\$ 11</b>	111
b. Proceedings under this section	112
<b>XIV. Reports of injuries (<b>\$ 12</b>)</b>	112
a. Text of <b>\$ 12</b>	112
<b>XV. Definition clauses (<b>\$ 13</b>)</b>	112
a. Text of <b>\$ 13</b>	112
b. Who are "employers"	113
c. "Contract of service"	114
d. Who are "workmen"	115
1. In general	115
2. Independent contractors	118
3. "Casual" employees	120
4. Seamen	120
5. Remuneration	121
e. Who are "dependents"	121
1. In England and Ireland and in Scotland under the Act of 1906	121
2. In Scotland under the Act of 1897	125
3. In the Colonies	126
<b>XVI. Appeals in Scotland where an action is raised independently of the act (<b>\$ 14</b>)</b>	127
a. Text of <b>\$ 14</b>	127
b. Effect of this section	127
<b>XVII. Termination of contracts relieving employers from liability; re-certification of schemes (<b>\$ 15</b>)</b>	128
a. Text of <b>\$ 15</b>	128
b. Effect of this section	128
<b>XVIII. Repealing clause (<b>\$ 16</b>)</b>	128
a. Text of <b>\$ 16</b>	128
b. Effect of this section	129
<b>XIX. Citing clause (<b>\$ 17</b>)</b>	129
a. Text of <b>\$ 17</b>	129



<b>XX. Compensation recoverable (sched. I.)</b>	<b>129</b>
a. Text of schedule I.	129
b. Meaning of phrase "where death results from the injury" (¶ 1a)	132
c. Amount recoverable in case of death by persons dependent upon the workman's earnings (¶ 1a)	134
d. Amount recoverable by workman totally or partially inca- pacitated (¶ 1b)	136
e. "Average weekly earnings" (¶ 2)	149
1. In general	149
2. Grades	150
3. Concurrent employments	152
4. Absences from work	152
5. Period of employment forming basis for computa- tion of average weekly earnings	155
6. Trade or calendar weeks	156
7. Continuity of the employment	157
8. Deductions	158
9. Remuneration other than regular wages	159
f. Medical examination of injured workman (¶¶ 4, 14, 15)	160
g. Payments to dependents (¶¶ 5-7)	162
h. Determination of question who are dependents (¶ 8)	163
i. Varying of the award (¶ 9)	163
j. Review of weekly payments (¶ 16)	163
k. Payment of lump sum (¶ 17)	172
l. Set-offs against weekly payments (¶ 19)	174
<b>XXI. Arbitration (sched. II.)</b>	<b>174</b>
a. Text of schedule II.	174
b. Construction of these provisions	177
1. Functions of committee's representative of the em- ployer and his workmen	177
2. Powers and functions of arbitrators	177
3. Appeals	178
4. Costs	181
5. Registration of memorandums of agreements	184
6. Proceedings by "parties interested"	187
7. Enforcement of awards and agreements	188
8. Rectification of the register	188
9. Agreements as to lump sums	189
10. Court in which proceedings may be brought	190
11. Deductions from awards	190
12. Reference to medical referees	190
13. Provisions applicable to Scotland only	191
<b>XXII. Act of 1900</b>	<b>191</b>
a. Text of the act	191
b. Effect of these provisions	191
<b>XXIII. Employments to which the act of 1897 was applicable</b>	<b>192</b>
a. Text of § 7 of the act of 1897	192
b. Scope and effect of these provisions in general	193
c. Meaning of the phrase "on or in or about"	193
1. In general	193
2. On, in or about a "railroad"	193
3. —a "factory"	194
4. —a "mine"	195
5. —"engineering work"	195
6. —"premises on which principal has undertaken to execute the work"	196

d. Buildings being constructed or repaired or demolished by means of a scaffolding .....	196
1. What is a "building" .....	196
2. Height of building .....	196
3. "Being constructed or repaired" .....	197
4. What is a "scaffolding" .....	198
e. Meaning of "railroad" .....	200
f. —of "factory" .....	200
1. In general .....	200
2. "Premises wherein steam, water or other mechanical power is used in aid of the manufacturing process" .....	200
3. Iron mills .....	201
4. "Premises wherein . . . any manual labor is exercised by way of trade or for purposes of gain" .	201
5. Premises in which "manual labor is exercised in adapting an article for sale" .....	202
6. "Shipbuilding yards" .....	202
7. "Bottle washing works" .....	202
8. Electrical stations for lighting any "street, public place," etc. ....	202
9. "Dock, wharf, quay" .....	203
10. "Warehouse" .....	206
11. Machinery used in the process of loading or unloading a ship .....	207
12. "Machinery temporarily used for the purpose of constructing a building" .....	208
g. —of "engineering work" .....	208
h. —of "mine" .....	209
i. —of "undertakers" .....	209
1. In the case of a factory .....	209
2. In the case of engineering work .....	212
j. When workmen employed in shipbuilding yard are not excluded from provisions of the act .....	213

### Part C. American decisions, 213.

XXIV. Introduction to American decisions .....	213
XXV. Constitutionality of American statutes .....	409
XXVI. Conflict of laws .....	443
XXVII. Extraterritorial effect of American statutes .....	443
XXVIII. Limitation of application of statutes by Federal laws .....	461
XXIX. Construction, effect and application of statutes generally .....	215
a. Strict or liberal construction .....	215
b. Retroactive effect of statutes .....	216
c. Occupations to which acts are applicable .....	216
XXX. Election to come in under optional act .....	219
XXXI. Exclusiveness of remedy furnished by statute .....	223
a. In general .....	223
b. Where injury is caused by wilful or intentional act of employer .....	224
c. Rights of parent where minor employee is injured .....	224
d. Rights and remedies where negligence of third person causes the injury .....	225
e. Right to contract out of the statute .....	227
XXXII. "Accident" and "personal injury" .....	227

XXXIII. Injuries "arising out of and in the course of" the employment ..	232
XXXIV. "Serious or wilful misconduct" of employee .....	243
XXXV. Notice of injury; "actual knowledge" of employer .....	244
XXXVI. Who are "employers" .....	245
XXXVII. Who are "employees" .....	246
a. In general .....	246
b. Independent contractors .....	247
c. "Casual" employees .....	247
XXXVIII. Who are "dependents" .....	248
XXXIX. Compensation recoverable .....	253
a. By dependents .....	253
b. By incapacitated employee .....	254
XL. Insurance funds .....	265
XLI. Appeal and review .....	266
XLII. Procedure in general .....	271

### Part D. Leading American cases printed in full, 273-483.

<i>On recovery of compensation for incapacity caused by disease</i>	
Yennen v. New Dells Lumber Co. ....	273
Re Hurle .....	279
Great Western Power Co. v. Pillsbury .....	281
Adams v. Acme White Lead & Color Works .....	283
Annotation .....	289
<i>On hernia as an "accident" or "personal injury"</i>	
Zappala v. Industrial Insurance Commission .....	295
Poccardi v. Public Service Commission .....	299
Annotation .....	303
<i>On compensation for injuries by assault</i>	
Re Reithel .....	304
Re McNicol .....	306
Annotation .....	309
<i>On compensation for injuries received while on the street</i>	
Hopkins v. Michigan Sugar Co. ....	310
Annotation .....	314
<i>On compensation for injuries received while seeking toilet facilities</i>	
Zabriskie v. Erie Railroad Co. ....	315
Annotation .....	317
<i>On compensation for injuries received while procuring refreshments</i>	
Re Sundine .....	318
Annotation .....	320
<i>On compensation for injuries received while trying to save personal belongings</i>	
Re Brightman .....	321
Annotation .....	322
<i>On compensation for loss of eye through infection</i>	
McCoy v. Michigan Screw Co. ....	323
Annotation .....	326
<i>On compensation for injuries while going to and from work</i>	
Milwaukee v. Althoff .....	327
De Constantin v. Public Service Commission .....	329
Annotation .....	331
<i>On compensation where insane workman commits suicide or suffers personal injuries</i>	
Re Standard Acci. Ins. Co. (Re Sponatski) .....	333
Milliken v. Travelers' Insurance Co. ....	339
Annotation .....	339



<i>On compensation for death or injury by lightning</i>	
<i>Hoenig v. Industrial Commission</i> .....	339
<i>Klawinski v. Lake Shore &amp; M. S. R. Co.</i> .....	342
<i>State ex rel. Peoples Coal &amp; Ice Co. v. District Court</i> .....	344
Annotation .....	347
<i>On intoxication as affecting right to compensation</i>	
<i>Nekoosa-Edwards Paper Co. v. Industrial Commission</i> .....	348
Annotation .....	351
<i>On what constitutes "serious and wilful misconduct"</i>	
<i>Clem v. Chalmers Motor Co.</i> .....	352
Annotation .....	355
<i>On rights and remedies where injuries are caused by negligence of third persons</i>	
<i>Peet v. Mills</i> .....	358
Annotation .....	360
<i>On what are "casual employees"</i>	
<i>Gaynor v. Standard Accident Insurance Co.</i> .....	363
Annotation .....	365
<i>On when man and wife are "living together"</i>	
<i>Northwestern Iron Co. v. Industrial Commission</i> .....	366
Annotation .....	370
<i>On "average weekly earnings" of workman employed by several employers</i>	
<i>Gillen v. Ocean Accident &amp; Guarantee Corporation</i> .....	371
Annotation .....	373
<i>On consideration of possible earnings in other employments</i>	
<i>Mellen Lumber Co. v. Industrial Commission</i> .....	374
Annotation .....	377
<i>On inability to get work as "incapacity for work"</i>	
<i>Re Sullivan</i> .....	378
Annotation .....	380
<i>On effect of refusal of injured workman to submit to operation</i>	
<i>Jendrus v. Detroit Steel Products Co.</i> .....	381
Annotation .....	387
<i>On constitutionality of workmen's compensation and industrial insurance statutes</i>	
<i>Kentucky State Journal Co. v. Workmen's Compensation Board</i> .....	389
<i>Jensen v. Southern Pacific Co.</i> .....	403
Annotation .....	409
<i>On extraterritorial effect of workmen's compensation acts; conflict of laws</i>	
<i>Pendar v. H. &amp; B. American Machine Co.</i> .....	428
<i>Reynolds v. Day</i> .....	432
<i>Kennerson v. Thames Towboat Co.</i> .....	436
Annotation .....	443
<i>On limitation of application of state compensation statutes by Federal laws</i>	
<i>State ex rel. Jarvis v. Daggett</i> .....	446
<i>Staley v. Illinois Central R. Co.</i> .....	450
Annotation .....	461
<i>On allowance for services of physician and nurse for injured workman</i>	
<i>Milwaukee v. Miller [1]</i> .....	465
<i>On compensation for death by drowning</i>	
<i>Boody v. K. &amp; C. Mfg. Co. [10]</i> .....	474
<i>On compensation where injury is aggravated by sport</i>	
<i>Kill v. Industrial Commission [14]</i> .....	478
<i>On compensation for injuries while performing work not employed to do</i>	
<i>Spooner v. Detroit Saturday Night Co. [17]</i> .....	481
<i>On compensation for injuries while going to push time clock</i>	
<i>Rayner v. Sligh Furniture Co. [22]</i> .....	486

# WORKMEN'S COMPENSATION.

## *Part A. Introductory.*

### *I. Introduction and scope of note.*

The purpose of this annotation is to bring together the English and Colonial and American cases involving the application and effect of the so-called workmen's compensation acts. The most radical departure in these statutes from the common law or the previous statutory law is the awarding of compensation in cases of injuries to workmen in the absence of any negligence, actual or imputed, on the part of the employer. The defenses of coservice and assumption of risk are entirely abrogated, as is the defense of contributory negligence, except in cases where the negligence of the injured servant amounts to serious or wilful misconduct. In support of these advanced steps, the injury to a workman has frequently been compared to the breaking of a machine, and as the cost of repairing the latter is borne by the industry, so should the burden of injuries to workmen be considered as an incidental expense of the business.<sup>1</sup>

In addition to giving compensation for

injuries, for which there had been no previous common-law or statutory remedy, the attempt has also been made to simplify the procedure so as to make the recovery quickly, easily, and inexpensively obtainable, thus doing away with the great delay and expense which so often attended former actions for personal injuries to employees.<sup>2</sup>

In an annotation of this character, an investigation of the causes leading up to the passage of these acts, and the ethical, humanitarian, or sociological theories underlying them, would be out of place. The discussion will be confined to the case law upon the subject, and the judicial conclusions as to the meaning of the various provisions of the acts will be set forth, and, as far as possible, harmonized, so that the general applicability and effect of the statute, as judicially interpreted, will be shown for future guidance.

As these statutes constitute an entirely new departure in the law of employers' liability, it is not surprising that there are numerous conflicting decisions, many of which are due to the inconsis-

<sup>1</sup>The act means that, apart from negligence, "the industry itself should be taxed with an obligation to indemnify the sufferer for what was an 'accident' causing damage." Lord Halsbury, L. C., in *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137.

The essential operation of the statutes herein discussed is, broadly speaking, that, irrespective of any negligence or misconduct on the master's part, the classes of servants to whom they are applicable are, in a certain sense, insured against any accident that takes place in the course of their employment. *Cooper v. Wright* [1902] A. C. (Eng.) 302, 71 L. J. K. B. N. S. 642, 51 Week. Rep. 12, 86 L. T. N. S. 776, 18 Times L. R. 622, per Lord Halsbury.

In 11 Journ. of Soc. of Comparative Legislation, p. 55, will be found an interesting and instructive criticism of the unsatisfactory features of this act. The learned contributor, Sir J. G. Hill, also gives much useful information concerning similar legislation in the countries of Continental Europe and elsewhere. He remarks that "the justification put forward for these new laws is that it is expedient in the public interest L.R.A.1916A.

to throw the risk of accidents upon the trade in which they occur, and that the employer can recoup himself for the cost incurred by him by raising the price of his productions and by reducing wages."

<sup>2</sup>After mentioning certain difficulties encountered by an injured workman in attempting to recover damages at common law or under the employers' liability act, Lord Brampton, in *Cooper v. Wright* [1902] A. C. (Eng.) 302, said: "Added to these obstacles, the law itself was for the most part too uncertain, too dilatory, and far too expensive for an ordinary workman to embark in."

Lord Stirling, in *Field v. Longden* [1902] 1 K. B. (Eng.) 47, 71 L. J. K. B. N. S. 120, 66 J. P. 291, 50 Week. Rep. 212, 85 L. T. N. S. 571, 18 Times L. R. 65, observed that the compensation act "was intended for the benefit of workmen, and not for that of the legal profession."

<sup>3</sup>Lord Brampton, in *Cooper v. Wright* (Eng.) supra, stated that the English act was so framed as to provoke rather than to minimize litigation.

In *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 K. B. (Eng.) 639, Lord Vaughan Williams said: "The act is not very easy to construe. It is an act as to which I



encies and crudities of the acts themselves,<sup>3</sup> and many others are due to the varying views taken by the different judges before whom the questions arose.<sup>4</sup>

The compensation principle originated in Continental Europe long before it was adopted in England, and statutes embracing this principle were in force in upwards of twenty-five jurisdictions before any similar act was passed in the United States.<sup>5</sup>

The first English act was passed in 1897, and the provisions of this act were extended to agricultural laborers by the act of 1900. The second act, passed in 1906, greatly extended the application of the statute, and simplified some of the complicated sections found in the earlier act.

The compensation principle has spread so quickly and so broadly among the American jurisdictions that it is probable that, in the near future, compensation acts will be in force in all of the states of the Union, and that these acts will be harmonized and the decisions thereon grow more uniform, so that there will be no more difficulty in construing and applying these acts than in applying any other statutes which are applicable to so broad a field.

Considering the length of the various statutes, it would be impracticable even if it would be useful, to print all of the statutes in full; but as the American statutes are patterned more or less closely after the English act, it has been deemed wise to print the text of the latter in full.

The English and Colonial decisions will be discussed together, and the American cases will then be taken up and grouped, so far as possible, according to the principle involved, although as the acts differ radically in many particulars, and the decisions covering any one point are not very plentiful, logical treatment cannot in all cases be attained.

think I may properly say that the difficulties of construction are so great that it is not desirable that judges should decide more than is absolutely necessary for the decision of the particular case before them."

<sup>4</sup>In *Sheehy v. Great S. & W. R. Co.* [1913] W. C. & Ins. Rep. 404, 47 Ir. Law Times 161, 6 B. W. C. C. 927, Holmes, L. J., said: "There is nothing more tiresome, and, I might add, more unprofitable than to try to reconcile propositions and dicta of judges, including my own, relating to the workmen's compensation act, and I shall not now attempt the task."

<sup>5</sup>"According to Bulletin No. 90 (September 1910) of the United States Bureau of Labor, pp. 723-748, the workmen's compensation acts outside the United States, to L.R.A.1916A.

By numerous cross references between the division of the note discussing the English cases, and that treating the American decisions, it is hoped to facilitate the comparison of decisions construing similar provisions in the various acts.

## Part B. English and Colonial decisions.

### II. In general.

The complete text of the English act of 1906 is given below, with such references to the act of 1897 as will indicate to the reader the material changes made. Of course, the most essential change was the extension of the remedy to all employments, instead of to certain designated employments. Wherever there has been a change of sufficient importance to be noted, brackets have been used to show the change, and bracketed matter without further explanation indicates parts of the original act which were omitted in the act of 1906. Where the provisions of the two acts are the same, no attempt has been made to differentiate the cases.

In England, appeals from the findings of the arbitrator upon questions of law lie only to the court of appeal, and the great body of decisions is from that court. When the case has been decided by some other court, that fact will be noted unless it appears from the context or from the form of the citation. The same is true in respect to the Irish decisions. In Scotland, appeals lie to the court of sessions, and if the decision is by any other court, that fact will also be noted.

The following British colonies, among possibly others, have statutes modelled closely after the English Acts: Alberta, British Columbia, Manitoba, Nova Scotia, Quebec, New South Wales, New Zealand, Queensland, and Western Australia.

together with the dates of first enactment, are: Germany (1884); Austria (1887); Norway (1894); Finland (1895); Great Britain (1897); Denmark (1898); Italy (1898); France (1898); Spain (1900); New Zealand (1900); South Australia (1900); New South Wales (1901); Netherlands (1901); Greece (1901); Sweden (1901); Western Australia (1902); Luxembourg (1902); British Columbia (1902); Russia (1903); Belgium (1903); Cape of Good Hope (1905); Queensland (1905); Hungary (1907); Transvaal (1907); Alberta (1908); Quebec (1909). The statutes in force in those twenty-six jurisdictions in 1909 are summarized in the same place." Article by Eugene Wambaugh, 25 Harvard L. Rev. 132.



The Colonial cases will be discussed in connection with the British cases involving similar points.

### *III. Application of the statute generally (§ 1).*

As to the application of the statute in cases of industrial diseases, see post, 106.

#### *a. Text of § 1.*

Section 1 (1). If in any employment [to which this act applies] personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this act.

(2) Provided that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least one [two, in the original act] week from earning full wages at the work at which he was employed:

(b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this act or take proceedings independently of this act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment, both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid:

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed, the exception as to injuries resulting in death or serious and permanent disablement was not in the original act.

(3) If any question arises in any proceedings under this act as to the liability to pay compensation under this act (including any question as to whether the person injured is a workman to whom this act applies), or as to the amount or duration of compensation under this act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this act, be settled

by arbitration, in accordance with the second schedule to this act.

(4) If, within the time hereinafter in this act limited for taking proceedings, an action is brought to recover damages independently of this act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this act. In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this act.

(5) Nothing in this act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this act.<sup>6</sup>

#### *b. "Injury by accident" (§ 1, subsec. 1).*

As to what constitutes an "accident" or "personal injury" within the meaning of the American statutes, see post, 227.

There has been considerable conflict as to the meaning of the word "accident" as used in the British act. Lord Halsbury has said that it was to be interpreted according to its ordinary and popular meaning,<sup>7</sup> and similar language was used in another case by Lord Macnaghten.<sup>8</sup> But in an Irish case, the Lord Chancellor observed that "the word

<sup>6</sup> The enactments here referred to are the coal mines regulation act 1887, the metalliferous mines regulation act 1872, and the factory and workshop act 1901.

<sup>7</sup> *Brintons v. Turey* [1905] A. C. (Eng.) 233, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137.

<sup>8</sup> *Fenton v. Thorley* [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684. In this case Lord Lindley said that the

'accident' has, when used in this statute, long ceased to have the meaning the man in the street would attribute to it."<sup>9</sup>

In a comparatively early case in the court of appeal, it was said that the word involves the idea of something fortuitous and unexpected.<sup>10</sup> But the use of the word "fortuitous" has been criticized in a House of Lords decision as meaning either just the same as accidental, or else introducing the element of "haphazard," which element was misleading, and not warranted by the act; and it was held that the word "accidental" was used in its ordinary and popular sense.<sup>11</sup>

word is not a technical legal word with a clearly defined meaning.

<sup>9</sup> *Sheerin v. Clayton* [1910] 2 I. R. (Ir.) 105, 3 B. W. C. C. 583.

<sup>10</sup> *Hensley v. White* [1900] 1 Q. B. (Eng.) 481, 81 L. T. N. S. 767, 48 Week. Rep. 257, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 16 Times L. R. 64.

<sup>11</sup> *Fenton v. Thorley* [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 787, 53 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684. Lord Macnaghten said: "It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as 'accidents' which beyond all others merit favorable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work, by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burthen which might possibly prove too heavy for them on to the shoulders of their comrades."

Recovery has been allowed where a workman while engaged in chipping the burs L.R.A.1916A.

In the House of Lords, an accident has been defined as "an unlooked-for or untoward event which was not expected or designed; and as "an unintended and unexpected occurrence which produces hurt or loss;"<sup>12</sup> it includes or denotes "any unexpected personal injury resulting to the workman, in the course of his employment, from any unlooked-for mishap or occurrence."<sup>13</sup> Whether or not the injury is an untoward event, not expected, is to be determined from the standpoint of the workman, and not from a medical aspect.<sup>14</sup>

It is well settled that to be entitled to compensation for "personal injury by accident" there must be a definite time, place, and circumstance to which the in-

jury is due. In *Fenton v. Thorley*, a workman was injured by a piece of the steel so chipped off, which struck him in the eye. *Neville v. Kelly Bros.* (1907) 13 B. C. 125. The somewhat singular contention rejected by the court was that the occurrence in question was an expected liability naturally resulting from the occupation in which the workman was engaged, and therefore did not involve the element of the fortuitous, apart from which an "accident" is not predicable.

<sup>12</sup> In *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, a workman engaged to rake ashes from the furnaces of a steamship suffered a heat stroke. It was contended that this was not an accident, but Lord Ashbourne said: "If the act is to be interpreted according to its 'ordinary and popular meaning,' as Lord Halsbury said was right in *Brintons v. Turvey* [1905] A. C. (Eng.) 233, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, would not the generality of mankind say that what occurred was an injury caused by an accident? The authorities support this view. In *Fenton v. Thorley* (Eng.) supra, where a man ruptured himself in an exertion during his employment, Lord Macnaghten laid down that an 'accident is used in the popular and ordinary sense of the word, as denoting an unlooked-for mishap, or an untoward event which is not expected or designed.' Lord Lindley in the same case said that 'in the act the word is used in a very loose way,' that it meant 'any unintended and unexpected occurrence which produces hurt or loss.'"

<sup>13</sup> Lord Shand in *Fenton v. Thorley* (Eng.) supra.

<sup>14</sup> *Fulford v. Northfleet Coal & Ballast Co.* (1907; C. C.) 1 B. W. C. C. (Eng.) 222.

In *Clover v. Hughes* [1910] A. C. (Eng.) 242, 3 B. W. C. C. 275, Lord Loreburn, L. C., said: "I cannot agree with the argument presented to your Lordships, that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would



jury can be referred.<sup>15</sup> But an accident in the sense of the act need not be an extraneous circumstance.<sup>16</sup> The word "accident" is not "made inappropriate by the fact that the man hurt himself;"<sup>17</sup> or by reason of the fact that "it was caused by deliberate violence" on the part of third persons.<sup>18</sup>

A nervous shock causing incapacity to work is as much "personal injury by accident" as is a physical injury.<sup>19</sup>

Where a scheme, under § 3, purports to be intended as a substitute for the act, the word "accident" in the scheme will be construed as having the same

not be an accident if a man very liable to fainting fits fell in a faint from a ladder, and hurt himself."

<sup>15</sup> "Except in the case of these industrial or scheduled diseases, unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred, by means of some definite event, the case cannot be brought within the general purview of the act, and does not entitle the workman or his dependents to compensation." *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 3 N. C. C. A. 230.

In *Alloa Coal Co. v. Drylie* (Ct. of Sess.) [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398, 50 Scot. L. R. 350, Lord Dundas said: "I think one may postulate as a result of all the decisions that you must have a definite 'accident' of some sort,—not necessarily an occurrence extraneous to the workman,—involving something unusual, unexpected, and undesigned, to which the injury or death can be unequivocally—or at least by a reasonably inferred train of causation in fact—attributed; and also probably, as a corollary, that death from disease—apart from the industrial diseases specially mentioned in the act of 1906 and subsequent statutory rules and orders—is not an 'accident' unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising at an ascertained time out of the employment."

The county court judge is not justified in finding that there was an accident, where a barber's assistant claimed that his hand began to smart on January 17th, and upon consulting a doctor on February 15th he was found to be suffering from dermatitis. *Petschett v. Preis* (1915) 31 Times L. R. (Eng.) 156. While dermatitis is a schedule disease, the applicant did not proceed under § 8, but under § 1, on the assumption that he had suffered an accident at the time when he first began to feel his hand smart. To succeed under § 1, there must be a finding that there had been an accident, which involved that something had happened at the definite time and place.

<sup>16</sup> *Euman v. Dalziel* [1913] S. C. 246, 50 Scot. L. R. 143, [1913] W. C. & Ins. Rep. 49, 6 B. W. C. C. 900 (peritonitis supervened L.R.A.1916A.

meaning as in the act, and to include disablement from disease, described in § 8 of the act.<sup>20</sup>

If a workman has suffered an injury by accident, he will not be deprived of compensation merely because something else occurs to produce incapacity; as where he would likewise have been incapacitated from heart disease,<sup>21</sup> or where he has been convicted of a crime and confined in prison.<sup>22</sup>

It has been pointed out that the statute does not in its terms refer to compensation for an "accident," but to "personal injuries by accident."<sup>23</sup> But the

after accident); *Alloa Coal Co. v. Drylie*, (Scot.) supra (a case of death from pneumonia following a chill after workman had been forced to stand in water for some time.)

These cases overruled in effect *Perry v. Baker* (1901; C. C.) 3 W. C. C. (Eng.) 29, in which the county court judge drew the inference, from a number of decisions of the court of appeal, that an accident within the meaning of the act must be the result of some extraneous circumstance.

<sup>17</sup> *Lord Robertson*, in *Fenton v. Thorley* [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684.

<sup>18</sup> *Trim Joint District School v. Kelly* [1914] A. C. (Eng.) 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 306, 30 Times L. R. 452, (1914) W. N. 177, 58 Sol. Jo. 493, 7 B. W. C. C. 274, [1914] W. C. & Ins. Rep. 359, 48 Ir. Law Times, 141.

<sup>19</sup> A nervous shock caused by a fatal injury to a fellow workman is an "accident." *Yates v. South Kirkby, F. & H. Collieries* [1910] 2 K. B. (Eng.) 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225.

<sup>20</sup> *Leaf v. Furze* (Div. Ct.) [1914] 3 K. B. (Eng.) 1068, 83 L. J. K. B. N. S. 1822.

<sup>21</sup> *Harwood v. Wyken Colliery Co.* [1913] 2 K. B. (Eng.) 158, 82 L. J. K. B. N. S. 414, 108 L. T. N. S. 283, 29 Times L. R. 290, 57 Sol. Jo. 300, [1913] W. C. & Ins. Rep. 317, [1913] W. N. 53, 6 B. W. C. C. 225.

<sup>22</sup> *McNally v. Furness* [1913] 3 K. B. (Eng.) 605, 82 L. J. K. B. N. S. 1310, 109 L. T. N. S. 270, 29 Times L. R. 678, [1913] W. N. 239, 6 B. W. C. C. 664, [1913] W. C. & Ins. Rep. 717.

A different result has been reached in an earlier case in the county court. *Clayton v. Dobbs* (1908) 2 B. W. C. C. (Eng.) 488.

<sup>23</sup> In *Warner v. Couchman* [1912] A. C. (Eng.) 35, 5 B. W. C. C. 177. Lord Loreburn, L. C., said: "I will only say this further: 'To be perfectly strict and accurate, it is somewhat lax to speak of this statute as though it referred to an accident. I am perfectly conscious that I myself, as well as others, have fallen into that lapsus linguæ; but at times it may be apt to con-



compensation to be awarded is not measured by the degree of the injury, but rather by the degree of the incapacity which is caused by the injury.<sup>24</sup>

An examination of the cases cited below will show that it is difficult, if not impossible, to reconcile all of the cases on this very important question of what constitutes an accident.

A strain resulting from overexertion in attempting to perform some unusual

ly heavy duty is now, by the majority of the cases, considered to be an accident.<sup>25</sup> A different view taken in some of the earlier cases must be considered as overruled.<sup>26</sup> An accident will not be inferred, however, where the disease or injury from which the workman suffered may or may not have been caused by strain, if there is no evidence of any overexertion.<sup>27</sup>

If the primary cause of the workman's

fuse one's idea of what is enacted in this particular act of Parliament. The act of Parliament does not speak of an accident,—it speaks of 'injury by accident arising out of and in the course of the employment.'

<sup>24</sup> Jones v. Anderson [1914] 84 L. J. P. C. N. S. (Eng.) 47, 112 L. T. N. S. 225, 31 Times L. R. 76, [1914] W. N. 432, 59 Sol. Jo. 159, [1915] W. C. & Ins. Rep. 151, 8 B. W. C. C. 2.

<sup>25</sup> "If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute." Stewart v. Wilsons & C. Coal Co. (1902) 5 Sc. Sess. Cas. 5th series (Scot.) 120, per Lord McLaren. In this case a workman strained his back in replacing a derailed coal hutch on the rails.

These words were also quoted with approval by Lord Ashbourne in Ismay v. Williamson [1908] A. C. (Eng.) 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, 42 Ir. Law Times, 213, 1 B. W. C. C. 232 (stoker suffered heat stroke).

A rupture caused by overexertion in attempting to turn the wheel of a machine is an "accident" within the meaning of the act. Fenton v. Thorley [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1. Lord Macnaghten said: "If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him."

A rupture caused by the effort of separating a plank from one to which it was stuck by ice formed during the preceding night may properly be found to have been caused by an "accident." Timmins v. Leeds Forge Co. (1900) 16 Times L. R. (Eng.) 521, 83 L. T. N. S. 120.

A workman in normal health was engaged in the course of his duty in removing a beam from a loom. He was in the act of lifting the beam on to his shoulder, when, finding that it was not evenly balanced, he gave it an extra lift, or hitch up, and in so doing ruptured several fibers of the muscles of his back, which incapacitated him for work. Held, that he had sustained L.R.A.1916A.

personal injury by "accident." Boardman v. Scott [1902] 1 K. B. (Eng.) 43, 71 L. J. K. B. N. S. 3, 66 J. P. 260, 50 Week. Rep. 184.

A workman who, while engaged in mowing around a field, stooped to straighten up some grain which had been trodden down, and "rung" his leg, which tore muscles and ruptured fibers from which traumatic phlebitis eventually developed, suffered injury by accident. Purse v. Hayward (1908; C. C.) 125 L. T. Jo. (Eng.) 10, 1 B. W. C. C. 216.

<sup>26</sup> Internal injuries resulting from an unusual strain in lifting heavier articles than those which the employee had previously been handling was held not to arise from "accident." Roper v. Greenwood [1901] 83 L. T. N. S. (Eng.) 471. The doctrine of the court in this case is strikingly similar to the old doctrine of assumption of risk. Smith, M. R., in sustaining the finding of the county court judge, said: "The facts of this case are that the plaintiff was employed as a box maker, and upon this occasion the boxes upon which she had to work were of a larger size than usual; everyone knew that they were so. She began to work upon these boxes in the morning; she found them somewhat too heavy for her; she did not give up, but went on with the work. There was nothing fortuitous or unforeseen as she went on from one box to another. When she came to the seventh box it was just the same as the others were before it, and there was nothing fortuitous or unforeseen. She strained herself and was injured. She says that the employers are liable to pay her compensation because the injury was caused by accident. Upon those facts the county court judge came to the conclusion that there was no accident at all; that there was nothing fortuitous or unforeseen."

Injury from a strain caused by lifting a bench was held not to arise from accident. Perry v. Baker (1901; C. C.) 3 W. C. C. (Eng.) 29. The county court judge said that this was a narrowed construction of the act, but that he felt himself bound by Hensey v. White (Eng.) cited in note 10, supra.

<sup>27</sup> A stroke of apoplexy which may or may not have been brought on by a strain or overexertion is not an injury suffered by "accident," where there is no evidence that the work subjected the workman to any serious strain. Barnabas v. Bersham Colliery Co. (1910) 103 L. T. N. S. (Eng.) 513, 55 Sol. Jo. 63. The House of Lords

incapacity is disease, or the impaired physical condition at a time when he is doing his ordinary work in the ordinary way, it cannot be said to have been caused by accident.<sup>28</sup> And this is the rule although the work is too hard for

the plaintiff, provided that he is not injured by any sudden strain.<sup>29</sup>

On the other hand, death or injury may be found to be the result of an accident, although the workman's impaired physical condition at the time

took the view that the onus of proof had not been discharged.

Where a workman apparently in ordinarily good health, suddenly dropped dead from heart disease while he was lifting baskets filled with corn, and the arbitrator found that there was no unusual or unexpected strain in the course of his work immediately preceding his death, there is no evidence upon which the arbitrator may find that his death was due to accident. *Kerr v. Ritchies* (1913) 50 *Scot. L. R.* 434, [1913] *S. C.* 613, 6 *B. W. C. C.* 419.

Where symptoms of heart failure which came on suddenly might have come from a sudden strain, or might have come simply from the progress of the disease, the county court judge is not justified in finding that there was an "accident." *Beaumont v. Underground Electric R. Co.* [1912] *W. C. Rep.* (Eng.) 123, 5 *B. W. C. C.* 247.

<sup>28</sup> *Hensley v. White* [1900] 1 *Q. B.* (Eng.) 481, 48 *Week. Rep.* 257, 69 *L. J. Q. B. N. S.* 188, 63 *J. P.* 804, 81 *L. T. N. S.* 767, 16 *Times L. R.* 64, denying the right of recovery in a case where a workman who was inherently weak internally ruptured a blood vessel when making an effort to start the wheel of a gas engine, which had become stiff from disuse.

A death cannot be attributed to "accident" where the deceased had suffered from progressive heart disease for some years, and was liable to die at any moment, and death came while he was doing his normal work. *O'Hara v. Hayes* (1910) 41 *Ir. Law Times*, 71, 3 *B. W. C. C.* 586.

No compensation can be awarded where the medical evidence was to the effect that the incapacity of the complainant was not due to the accident, but to an eczematous condition not caused by the accident. *Swinbank v. Bell Bros.* (1911) 5 *B. W. C. C.* (Eng.) 48.

Death from erysipelas of the face, nearly three months after an injury to the hand, which had healed, cannot be said to be by "accident." *Hugo v. Larkins* (1910) 3 *B. W. C. C.* (Eng.) 228.

Where a workman died of heart disease, and the arbitrator finds that the man was working in the usual routine of business not strenuous, and that nothing unusual had occurred on the occasion, it is error for him to further find that the workman had met with an accident. *Kerr v. Ritchies* [1913] *S. C.* 613, 50 *Scot. L. R.* 434, [1913] *W. C. & Ins. Rep.* 297, 6 *B. W. C. C.* 419.

Where a man's arteries were in a diseased condition of long standing, and he was attacked, while working, by angina pectoris, and died on the evening of the same day, there is no evidence to sustain a finding that he died from accident, it being shown that his work was not heavy and required no

straining, and that the disease may be brought on by a variety of causes, and does not always come on immediately after the exertion is made. *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 *K. B.* (Eng.) 988, 80 *L. J. K. B. N. S.* 769, 104 *L. T. N. S.* 365, 27 *Times L. R.* 282, 55 *Sol. Jo.* 329, 4 *B. W. C. C.* 178.

A workman employed to make a steam pipe joint, who suffers injury through the red lead coming in contact with a finger which had previously been in a blistered condition, does not suffer injury by "accident." *Walker v. Lilleshall Coal Co.* [1900] 1 *Q. B.* (Eng.) 488, 81 *L. T. N. S.* 769, 69 *L. J. Q. B. N. S.* 192, 64 *J. P.* 85, 48 *Week. Rep.* 257, 16 *Times L. R.* 108. But see *Dotzauer v. Strand Palace Hotel* (Eng.) note 31 *infra*.

An "accident" was not proved where the evidence showed that the applicant was a man who was suffering from an advanced disease in the mitral valve of the heart and from enlargement of the heart, and it was found in fact that this condition was not due to the alleged accident, but was of long standing, though possibly the man may not have been aware of the disease, that it was in its nature progressive, and was bound to manifest itself sooner or later, and would have done so probably in the way in which it did, and might have done so even when he was not engaged in active exercise. *Spence v. Baird* [1912] *S. C.* 343, 49 *Scot. L. R.* 278, 5 *B. W. C. C.* 542, [1912] *W. C. Rep.* 18.

A miner cannot be said to have suffered injury by accident where he was employed in the mine but three days, and the work which he had been doing was of a very light nature, not requiring any great exertion or strain, and on each of the first two days he had complained of illness, and upon the third day and after a few hours suffered an attack of cerebral hemorrhage after doing but very little work, and appearing to be ill at ease all of the time. *Federal Gold Mine v. Ennor* (1910; *H. C. of A.*) 13 *C. L. R.* (Austr.) 276.

<sup>29</sup> Where the cause of a miner's incapacity was cardiac breakdown, due to the fact that the work in which he had for some days been engaged was too heavy for him, the repeated excessive exertion having strained his heart unduly, and he was not injured by any sudden jerk, it may be found that the injury was not an "injury by accident" within the meaning of the act. *Coe v. Fife Coal Co.* [1909] *S. C.* 393, 46 *Scot. L. R.* 328. Lord Kinnear said it was not an accident, as it was the ordinary and necessary consequence of continuous work lasting over a considerable time.

And see the cases cited in note 39, *infra*.



may have rendered him more susceptible to the injury than a normally healthy man. It is only where the injury or death is caused solely by the previous

condition of the workman that compensation is denied.<sup>30</sup> So, too, compensation may be recovered although the consequences of the injury may have been

<sup>30</sup> The fact that a man who has died from a heat stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713.

The facts in the case of *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. (Eng.) 428, are very similar to those in *Ismay v. Williamson* (Eng.), and the case was decided upon the authority of the latter case.

See also *Golder v. Caledonian R. Co.* (1902) 5 Sc. Sess. Cas. 5th series (Scot.) 123 (workman affected by nephritis; accident lowered his vitality and accelerated death).

Where a workman dies from the rupture of an aneurism, and "the death is caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal," he suffers an injury by "accident" within the meaning of the act. *Hughes v. Clover* [1909] 2 K. B. (Eng.) 798, 78 L. J. K. B. N. S. 1057, 101 L. T. N. S. 475, 25 Times L. R. 760, 53 Sol. Jo. 763, affirmed in [1910] A. C. (Eng.) 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885. Lord Macnaghten thus concisely passed upon this question: "The man ruptured an aneurism in his aorta. An aneurism, as I understand it, is an unnatural or abnormal dilatation of an artery; but still it is a part of the artery, and so a part of the man's body. The man 'broke part of his body,' to borrow Lord Robertson's expression in *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, and he certainly did not mean to do it."

To the same effect, *McArdle v. Swansea Harbour Trust* (1915) 8 B. W. C. C. (Eng.) 489, in which the facts were very similar, and which was decided upon the authority of *Hughes v. Clover*.

*Hughes v. Clover* (Eng.) was followed in *Groves v. Burroughes* (1911) 4 B. W. C. C. (Eng.) 185, where a workman returned to work before a wound had healed, and it burst while he was performing his ordinary work; and in *Trodden v. McLennard* (1911) 4 B. W. C. C. (Eng.) 190, where a workman descending the side of a ship on a ladder was heard to give a cry as he fell into the water, and it was shown that the heart was in such a condition that any slight exertion might have caused failure.

A stroke of apoplexy, resulting in the death of a gateman, which was brought on by his running from his place of work L.R.A.1916A.

to the scene of an accident, about 100 yards distant, and back again to give notice of the accident, is itself an accident within the meaning of the statute. *Aitken v. Finlayson* [1914] S. C. 770, [1914] 2 Scot. L. T. 27, 51 Scot. L. R. 653, 7 B. W. C. C. 918.

A cerebral hemorrhage caused by exertion is an injury caused by accident although at the time of the first attack the arteries were in a degenerate condition, which rendered such an attack more likely to occur. *M'Innes v. Dunsmuir* [1908] S. C. (Scot.) 1021.

The county court judge may draw the inference that an injury was caused by an accident, where it appears that a fireman who had been engaged in raking out the fires in a stove hole suffered an apoplectic stroke, although the medical evidence was to the effect that the man's arteries were in a diseased condition. *Broforst v. The Blomfield* (1913) 6 B. W. C. C. (Eng.) 613.

A workman employed to load heavy sacks on to a truck and then push the truck along rails shortly afterwards, who while resting fell senseless and died, may be held to have met with an accident, where the medical evidence proved that the heart would not have failed had it not been subjected to more than ordinary strain. *Doughton v. Hickman* [1913] W. C. & Ins. Rep. (Eng.) 143, 6 B. W. C. C. 77.

It may be found that the death of an engine driver resulted from injury by accident, where he was last seen alive at work upon his engine, and was subsequently found by the side of the engine with his legs doubled up, and died shortly thereafter, notwithstanding he had, on at least three previous occasions, collapsed in a faint and lain unconscious for some minutes, when upon the medical evidence it appeared that he had a sound heart, and a few days before the occurrence he was examined by the physician of the company, and was presumably passed as physically fit for his position. *Fennah v. Midland G. W. R. Co.* (1911) 45 Ir. Law Times, 192, 4 B. W. C. C. 440.

Where a workman unloading coal from a ship is seized with an epileptic fit and falls down the hatchway into the hold, it is an accident. *Wicks v. Dowell* [1905] 2 K. B. (Eng.) 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732.

In *Warnock v. Glasgow Iron & Steel Co.* (1904) 6 Sc. Sess. Cas. 5th Series (Scot.) 474, it was held to be a question of fact for the jury whether the death of a miner seventy-nine years old, who died after having been injured by the fall of a stone from the roof of a pit was caused by the injury or by apoplexy.

A workman engaged in a lighter in coal-ing a ship, who upon a sudden rush of coal



aggravated by the workman's physical condition.<sup>31</sup> And it has been said that where the progress and intensity of the disease was aggravated by an accident, compensation will be allowed.<sup>32</sup>

Where the injury is the gradual result of doing a particular kind of work, so that it would be impossible to refer the happening of the injury to any partic-

ular day, and it is what might naturally be expected if work of that character is pursued, it is not an "accident." In cases in which this principle is applicable, the injury may be in the nature of some acute disease, caused by inhaling poisonous matter,<sup>33</sup> or of some skin disease caused by the hands coming in direct contact with poisonous substances,<sup>34</sup>

was struck in the stomach, either by the coal or by a basket which he held against his body, and who, after being operated upon at the hospital, died from peritonitis caused by a perforation of the bowel, may be held to have died from the accident, although he was suffering from a weakened and disordered bowel condition due to chronic appendicitis, which rendered him more likely to be injured by a blow than though he had been in a healthy condition. *Woods v. Wilson* (1915) 84 L. J. K. B. N. S. (Eng.) 1067, 31 Times L. R. 273, [1915] W. N. 109, 59 Sol. Jo. 348, 8 B. W. C. C. 288.

<sup>31</sup> Where a workman in handling a hammer makes a mis-hit and strikes a "flatter" held by another workman, thus jarring his arm and producing a severe swelling, there is an "accident," although the swollen condition is declared by a doctor to have been due to gout brought on by the jar. *Lloyd v. Sugg* [1900] 1 Q. B. (Eng.) 486, 69 L. J. Q. B. N. S. 190, 81 L. T. N. S. 768, 16 Times L. R. 65.

A man who, suffering from a disease of the skin, incurs injury by putting his hands into water with soda and soft soap in it, is injured by accident. *Dotzauer v. Strand Palace Hotel* (1910) 3 B. W. C. C. (Eng.) 387. *Cozens-Hardy, M. R.*, observed: "The mere circumstance that a particular man, in doing work arising out of and in the course of his employment, meets with an accident which a perfectly healthy man would not have met with, is no answer at all." But see *Walker v. Lilleshall Coal Co.* (Eng.) note 28, *supra*.

A brewer's assistant who felt a severe strain in his side, when, in the course of his employment, he was lifting a cask weighing about 50 pounds, attached to a pipe, from a shelf 5½ feet from the ground, which pain was caused by a rupture, suffered an accident arising out of and in the course of his employment, although the rupture was in the same place as one from which he had suffered twenty-two years before, where it appeared that the early rupture was entirely cured, and that he had not worn a truss for upwards of six years, during which time he had done his work as an ordinary man would have done. *Brown v. Kemp* (1913) 6 B. W. C. C. (Eng.) 725.

Where a workman engaged in digging out lumps of chalk from a chalk quarry, who was suffering from a slight hernia at the time he entered the service of his employer six months previously, strained himself in attempting to get out a piece larger

than usual, but not larger than some others which had been gotten out successfully, which strain aggravated the existing hernia and wholly incapacitated him, the injury received from the strain, although if regarded solely from a medical aspect could not be an untoward event not expected, yet from the standpoint of a workman not learned in medicine or surgery could be regarded only as occasioned by a mishap or untoward event not expected or designed. *Fulford v. Northfleet Coal & Ballast Co.* (1907; C. C.) 1 B. W. C. C. (Eng.) 222.

<sup>32</sup> *Willoughby v. Great Western R. Co.* (1904; C. C.) 117 L. T. Jo. (Eng.) 132, 6 W. C. C. 28.

<sup>33</sup> *Steel v. Cammell* [1905] 2 K. B. (Eng.) 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142 (gradual lead-poisoning contracted by a ship-caulker).

Typhoid fever contracted while handling sewage is not an accident within the meaning of the compensation act, where it is not possible to indicate the time and place when the disease was contracted. *Finlay v. Tullamore Union* (1914) 48 Ir. Law Times, 110, 7 B. W. C. C. 973.

Enteritis contracted by inhaling sewer gas while working in a sewer is not an "injury by accident." *Broderick v. London County Council* [1908] 2 K. B. (Eng.) 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885. But see discussion in connection with the so-called anthrax case, in notes 48 et seq., *infra*.

Except in the case of the industrial or scheduled diseases, unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the act, and does not entitle the workman or his dependents to compensation. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 N. C. C. A. 230, 3 B. W. C. C. 482 (death resulted from ptomain poisoning contracted by inhaling sewer gas while working around cess pools).

An attack of colic set up by lead poisoning is not an injury by accident. *Williams v. Duncan* (1898; C. C.) 1 W. C. C. (Eng.) 123.

<sup>34</sup> Eczematous sores on the workman's hand, caused gradually by working over carbon bisulphide are not caused by accident. *Evans v. Dodd* [1912] W. C. Rep. (Eng.) 149, 5 B. W. C. C. 305.

or in the form of abscesses caused by some portion of the body coming in contact with hard substances.<sup>35</sup> Again, the injury may be in the nature of a general breakdown, due to overwork.<sup>36</sup> Waste overrunning repair, says Fletcher Moulton, L. J., is not an accident.<sup>37</sup>

A hospital nurse or a hospital attendant who contracted a disease while at work in the hospital cannot say that he has suffered injury by accident which entitles him to compensation.<sup>38</sup>

Dermatitis incurred in washing out ink cans with a strong solution of caustic soda is not an accident. *Cheek v. Harmsworth Bros.* (1901; C. C.) 4 W. C. C. (Eng.) 3.

A barber's assistant who suffered from dermatitis, alleged to have been contracted from the use of a dangerous dry shampoo, cannot recover compensation where he proceeds under § 1, claiming to have suffered an accident, although dermatitis may be a schedule disease, and he might have recovered had he proceeded under § 8. *Petschett v. Preis* (1915) 31 Times L. R. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44.

<sup>35</sup> A miner is not injured by accident where he suffers from the gradual formation of abscesses, one in the hand caused by the continual use of the pick, the other in the knee caused by continual kneeling while at work. *Marshall v. East Holywell Coal Co.* (1905) 93 L. T. N. S. (Eng.) 360, 21 Times L. R. 494.

<sup>36</sup> That a workman labored very hard for several days, working seventeen hours a day, and for the last twenty-four hours practically continuously, and that six days afterwards he dropped dead from heart disease, and that there was medical evidence that death was due to heart failure following on the continual strain of overwork, does not justify a finding that the death was due to accident. *Black v. New Zealand Shipping Co.* [1913] W. C. & Ins. Rep. (Eng.) 480, 6 B. W. C. C. 720.

Partial paralysis progressively brought on by the continued use of a tricycle is not an injury by accident. *Walker v. Hockney Bros.* (1909) 2 B. W. C. C. (Eng.) 20.

The arbitrator is justified in denying compensation where he found that the workman's incapacity was due to continual strain after he had returned to work, and not to a previous accident, for which he had received compensation. *Paton v. Dixon* [1913] W. C. & Ins. Rep. 517, 50 Scot. L. R. 866, 6 B. W. C. C. 882, [1913] S. C. 1120.

See also *Coe v. Fife Coal Co.* [1909] S. C. 393, 46 Scot. L. R. 328, cited in note 29, supra, where cardiac breakdown was due to continual work which was too heavy for the workman.

<sup>37</sup> *Walker v. Hockney Bros.* (Eng.) supra.

<sup>38</sup> *Martin v. Manchester Corp.* [1912] W. C. Rep. (Eng.) 289, 106 L. T. N. S. 741, 76 J. P. 251, [1912] W. N. 105, 5 B. W. C. C. 259.

<sup>39</sup> A workman who contracts pneumonia L.R.A.1916A.

On the other hand, where a disease is contracted as the direct result of unusual circumstances connected with the work, and is not the ordinary result of pursuing the work, it is to be considered as caused by accident.<sup>39</sup> A disease which is the consequence of an accident is within § 1 of the act, although not the natural result,<sup>40</sup> or even the probable result.<sup>41</sup> Thus, a disease which follows a wetting received in the course of the employment is an injury by accident;<sup>42</sup>

from the inhalation of gas generated by an explosion suffers from "accident." *Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. C. C. 417.

Where a miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in and caused his death, there was an injury resulting from an "accident." *Thompson v. Ashington Coal Co.* (1901) 84 L. T. N. S. (Eng.) 412, 17 Times L. R. 345.

<sup>40</sup> *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. (Eng.) 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622 (workman was injured on the knee, and suffered from exposure while slowly making his way home in his injured condition).

<sup>41</sup> *Dunham v. Clare* [1902] 2 K. B. (Eng.) 292, 71 L. J. K. B. N. S. 683, 86 L. T. N. S. 751, 18 Times L. R. 645, 50 Week. Rep. 596, 66 J. P. 612 (erysipelas supervened in wound).

<sup>42</sup> The arbiter may find that a miner's death was due to "accident," where there was evidence that he was chilled, or contracted a chill, after being required to stand in water icy cold up to his knees for about twenty-five minutes, through the failure of the lift to descend in response to the signals, the pumps used to take the water out of the pit being defective and stopped for repairs. *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398 [1913] S. C. 549, 50 Scot. L. R. 350, [1913] 1 Scot. L. T. 167. Lord Salveson dissented upon the ground that there was no case where a death from a disease such as pneumonia had been held to be a death resulting from injury by accident, because it might be, with more or less probability, attributed to an accidental exposure to wet or cold. He further observed: "The pneumonia itself did not develop for nearly a week, and I do not think the inference which the arbitrator drew was warranted by the facts he has stated; unless indeed the fact that a man has caught a cold during his work from which he never recovers until pneumonia supervenes is a ground for inferring that the circumstances which produced the cold also produced the supervening pneumonia, however long the interval that elapsed."

A pilot who, after taking a ketch out of harbor, jumped into his boat from the ketch, and in so doing upset the boat, and got



so is a 'disease which follows exposure to a draught.<sup>43</sup> So where a workman has been injured, and a disease intervenes, retarding recovery or rendering it less complete, the increased incapacity is referable to the accident.<sup>44</sup> In a Scotch case it was held that pleurisy following a chill after a workman had become overheated at his work was not an accident.<sup>45</sup> It seems impossible to reconcile this case with those immediately preceding.<sup>46</sup>

As to when death results from an injury so as to entitle dependents to recover compensation, although the death is not the probable consequence of the injury, see cases cited post, 133.

A workman suffered injury by "accident," where bran dust containing grit

got into his eyes, and by rubbing them an abrasion was caused which necessitated the removal of the eye, and affected the sight of the other.<sup>47</sup> But where a microbe from some source not connected with the employment entered the eye and set up inflammation, the county court judge was justified in holding that the employers were not liable to compensation for the resulting incapacity, although the workman had previously got harmless dust into his eye, and by rubbing it had caused an abrasion rendering the action of the microbe more serious.<sup>47a</sup> It has been held by the House of Lords, sustaining the court of appeal, that an infection of a workman with anthrax while engaged in handling wool is an "accident."<sup>48</sup>

wet up to the thighs, and contracted sciatica, was injured by accident. *Barbeary v. Chugg* (1915) 84 L. J. K. B. N. S. (Eng.) 504, 112 L. T. N. S. 797, 31 Times L. R. 153, [1914] W. C. & Ins. Rep. 174, 8 B. W. C. C. 37. The master of the rolls said that he did not intend to lend any countenance to an idea that because a pilot got wet in rough weather he had met with an accident within the meaning of the act, but that in the case at bar there was sufficient evidence to justify the finding of the county court judge that there was an accident.

Inflammation of the kidneys, caused by being obliged to work in water for a fortnight, is injury by accident. *Sheerin v. Clayton* [1910] 2 I. R. 105, 44 Ir. Law Times, 23, 3 B. W. C. C. 583.

In *McLuckie v. Watson* [1913] S. C. 975, 50 Scot. L. R. 770, 6 B. W. C. C. 850, where a miner contracted a chill and became incapacitated as the result of standing in the water for some thirty minutes, it was held that as the wetting was voluntarily incurred in an attempt to be among the first to reach the top of the shaft, it could not be said to be an accident arising out of the employment.

<sup>43</sup> A miner who, because of a wreck in a shaft, was obliged to wait an hour and a half at the downcast shaft, which subjected him to a draught which gave him a chill, and subsequently died from pneumonia, suffers an accident, and his dependents are entitled to compensation. *Coyle or Brown v. Watson* [1915] A. C. (Eng.) 1, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, [1914] W. N. 195, 7 B. W. C. C. 257, 83 L. J. P. C. N. S. 307, [1914] W. C. & Ins. Rep. 228, reversing [1913] S. C. 593, 50 Scot. L. R. 415, [1913] W. C. & Ins. Rep. 223, 6 B. W. C. C. 416.

<sup>44</sup> Where a workman was injured in such a way as to necessitate an operation, and, before he had recovered from the operation, was attacked by scarlet fever, which delayed the healing of the wound, and caused it to become unhealthy and suppurate, which necessitated a second operation, with the result that the knee joint was stiff and L.R.A.1916A.

could not be moved, and one leg a little shorter than the other, the county court judge erred in finding that the resulting incapacity was not caused by the accident, but by the scarlet fever. *Brown v. Kent* [1913] 3 K. B. (Eng.) 624, 82 L. J. K. B. N. S. 1039, 109 L. T. N. S. 293, 29 Times L. R. 702, [1913] W. N. 258, 6 B. W. C. C. 745.

<sup>45</sup> A canvasser and collector of accounts who, in going up into a flat three flights of stairs up, overexerted himself and became sweated, with the result that he contracted a chill which developed into pleurisy and incapacitated him from work, did not suffer from accident. *M'Millan v. Singer Sewing Mach. Co.* [1913] S. C. 346, [1913] W. C. & Ins. Rep. 70, 50 Scot. L. R. 220, 6 B. W. C. C. 345, [1912] 2 Scot. L. T. 484.

<sup>46</sup> The Lord President said: "Looking at this as a plain man, I think that nothing could be further removed from an accident than what happened in this case. All that the claimant can say is that in the course of his ordinary work he got overheated,—he got, as he puts it, sweated,—and that when he got home he felt that he had contracted a chill, and afterwards found that he was suffering from pleurisy. I must say that until I am compelled to say so by a higher tribunal, I shall never admit that such a thing as this is an accident." *Ibid.*

<sup>47</sup> *Adams v. Thompson* (1911) 5 B. W. C. C. (Eng.) 19.

<sup>47a</sup> *Bellamy v. Humphries* [1913] W. C. & Ins. Rep. (Eng.) 169, 6 B. W. C. C. 53.

<sup>48</sup> *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 475, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, affirming [1904] 1 K. B. (Eng.) 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 690, 20 Times L. R. 129.

This case was decided before the enactment of the 3d schedule of the act of 1906, which relates to industrial diseases. It will be noted that the disease, anthrax, is expressly included in that schedule. The reasoning of the various judges in the court of appeal and in the House of Lords sus-



Prostration by sunstroke may be found to be an accident.<sup>49</sup> So death resulting from a heat stroke may be found to be due to an accident.<sup>50</sup> Cases involving sunstroke and heat stroke or heat prostration, however, usually turn on the question whether the injury arises "out of and in the course of" the employment. See notes 74 et seq., *infra*.

Injuries resulting from an assault by third persons upon a workman while he is acting strictly within the scope of his employment in defending the property of his employer are injuries by "acci-

taining this conclusion is not entirely clear, and can only be explained upon the theory that the learned judges believed that the bacillus of anthrax was something so tangible that an impact of such a bacillus with a portion of the human body could be compared with the impact of some material object, such as sand or a particle of steel, etc.; but the bacillus of other diseases is of less tangible form. The judges sustaining the judgment held that infection with anthrax did not differ from cases of tetanus, erysipelas, pneumonia, etc., following the accident, but Lord Robertson pointed out that in those cases there was an accident distinct from the disease, while in the case at bar the so-called accident was solely the inception of the disease.

Both Lord Lindley in the House of Lords and Cozens-Hardy, L. J., in the court of appeal, sustaining the judgment, stated that it was not every disease caught by a workman in the course of his employment that was to be regarded as an accident within the meaning of the statute; but the language of the other judges is so broad that if weight is given to their observation it is difficult to see how any disease arising from infection to which the workman was subjected while in the scope of his employment would not come within the application of the statute. For instance, in the court of appeal Mathew, L. J., said: "It was an accident that the workman in dealing with the wool was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him." So also Cozens-Hardy, L. J., said: "It seems to me that on the facts of this case we have something unexpected arising by reason of dealing with raw materials in the process of manufacture in which the workman was engaged."

In the House of Lords, Lord Halsbury, L. C., compared the contract of the bacillus of anthrax with that of a tack or other poisoned substance that cut the skin and set up tetanus. Lord Macnaghten said: "It was an accident that this noxious thing escaped the down draught or suck of the fan which the Board of Trade, as we were told, requires to be in use while work is going on in such a factory as that where the man was employed. It was an acci-

dent."<sup>51</sup> So an assistant school master in an industrial school, who died from a fracture of the skull and other injuries, the result of an assault committed upon him by several boys in the school in pursuance of a prearranged plan, suffered injury by accident.<sup>52</sup> And in one case it was held that although the injury was caused by a stone wilfully thrown by a boy, it might be said to be an "accident" from the standpoint of the one who suffered the injury.<sup>53</sup> But the Scotch court, on the contrary, has held that an employee

dent that the thing struck the man on a delicate and tender spot in the corner of his eye. It must have been through some accident that the poison found entrance into the man's system, for the judge finds that there was no abrasion about the eye, while the medical evidence seems to be that without some abrasion infection is hardly possible."

<sup>49</sup> *Morgan v. The Zenaida* (1909) 25 Times L. R. (Eng.) 446, 2 B. W. C. C. 19; *Davies v. Gillespie* (1911) 105 L. T. N. S. (Eng.) 494, 28 Times L. R. 6, 56 Sol. Jo. 11, 5 B. W. C. C. 64.

<sup>50</sup> *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 1 B. W. C. C. 232, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, 42 Ir. Law Times, 213; *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. (Eng.) 428.

<sup>51</sup> The murder of a cashier for the sake of robbery is an "accident" within the statute. *Nisbet v. Rayne* [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507.

A gamekeeper who is beaten by poachers suffers an injury by "accident" within the act. *Anderson v. Balfour* [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. C. C. 588.

<sup>52</sup> *Kelly v. Trim Joint District School* [1913] W. C. & Ins. Rep. 401, 47 Ir. Law Times, 151, 6 B. W. C. C. 921, affirmed in [1914] A. C. (Eng.) 667, 111 L. T. N. S. 306, 30 Times L. R. 452 [1914] W. N. 177, 7 B. W. C. C. 274, 83 L. J. P. C. N. S. 220, 58 Sol. Jo. 493, 48 Ir. Law Times, 141, [1914] W. C. & Ins. Rep. 359. *Holmes, L. J.*, said: "The only difficulty in the case is whether what occurred was an accident. In its derivation, accident only suggests an occurrence,—something that happened; but in ordinary use it means that unexpected and undesigned occurrence, and I am of opinion that it implies something unexpected and undesigned by both master and servant. But something done deliberately and wilfully by a third party may be an accident from the point of view of employers and employed."

<sup>53</sup> *Challis v. London & S. W. R. Co.* [1905] 2 K. B. (Eng.) 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23.

taking the place of strikers, who is assaulted by the latter, is not injured by accident, since the word "accident," taken in its popular sense, excludes a case where the injury is wilfully inflicted by another person.<sup>54</sup> In a later case, however, Viscount Haldane said that a workman meeting with an assault meets with what may properly be called an accident, and it is not the less an accident in the ordinary and popular sense in which the word is used, merely for the reason that it is caused by personal violence, and that the Scotch court in the case just cited must have misinterpreted former decisions of the House of

Lords.<sup>55</sup> He also said that where the word "designed" was used in defining an accident it meant "designed by the sufferer."

It would seem to be clear that the decision of the court of session is contrary to the language used by the Lord Chancellor, and must give way to that of the higher court. The question whether injuries from assault arise out of and in the course of the employment is discussed hereafter. See notes 49 et seq., *infra*.

The burden of proving that the injury was caused by accident arising out of and in the course of the employment is upon the applicant;<sup>56</sup> the accident may

<sup>54</sup> *Murray v. Denholm* [1911] S. C. 1088, 48 Scot. L. R. 896, 5 B. W. C. C. 496. The Lord Justice-Clerk said: "Can it be said that these judgments, in applying the word 'accident' to an incident of wilful crime, are giving to it its popular and ordinary meaning? I cannot think so. In ordinary and popular language the word 'accident' excludes wilful intent to do injury on the part of the person by whose act the injury is caused, whether that person be the injured individual himself, or another person who maliciously injures him. A witness who sees an injury inflicted will declare it to have been accidental or intentional, according to what he observes. It is the quality of the act, and not some relation in which the injured person stands as regards employment, which determines the question whether what was done was accidentally or wilfully inflicted. To say that, if a man comes into a place where a workman is employed, and assaults and injures and perhaps murders him (a case figured by Lord Young in *M'Intyre v. Rodger* [1903] 6 Sc. Sess. Cas. 5th Series, 176, 41 Scot. L. R. 107, 11 Scot. L. T. 467), this is a crime, and not an accident if the man is acting from mere personal spite, but that it is an accident if done to intimidate the workman and drive him out of his employment, is in the former case to use the word in its ordinary and popular meaning, and in the latter to refuse to do so, and to apply it in a sense which is contrary to ordinary and popular understanding. Such an interpretation is therefore directly contrary to the first part of Lord Macnaghten's definition. Then again, it is to be observed that when Lord Macnaghten speaks of an 'untoward event' he speaks of it as being one that is 'not expected or designed.' He therefore clearly excludes from his exegesis of 'accident' something which is designed. Now, can it be said that when a man stabs another or shoots another, that that is mishap or untoward event 'not designed?' Lord Macnaghten's definition plainly means that an injury inflicted by design is not an accident. That which is designed is the antithesis of that which is accidental." In distinguishing the case of *Challis*, *supra*, he further L.R.A.1916A.

said: "In that case some boys dropped a stone over the side of a bridge as an engine was passing underneath, intending to try to drop it into the funnel. It struck and broke the window of the weatherboard, and drove some broken glass into the engine-driver's eye. This was held to be an accident, there being no intention to injure, and the offender being a young boy. I think such a decision might be held to be reasonable, just as I think it would be reasonable to hold that an injury caused to a platelayer by the thoughtless throwing of an emptied bottle out of a train might be held to be caused by accident. The doing of a foolish thing may be held not to be designedly done to cause injury." It cannot be said that the reasoning is entirely satisfactory.

<sup>55</sup> *Trim Joint District School v. Kelly* [1914] A. C. (Eng.) 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 306, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, [1914] W. N. 177, 48 Ir. Law Times, 141, [1914] W. C. & Ins. Rep. 359.

<sup>56</sup> *McDonald v. The Banana* [1908] 2 K. B. (Eng.) 926, 24 Times L. R. 887, 52 Sol. Jo. 741, 78 L. J. K. B. N. S. 26, 99 L. T. N. S. 671; *Honor v. Painter* (1911) 4 B. W. C. C. (Eng.) 188; *Browne v. Kidman* (1911) 4 B. W. C. C. (Eng.) 199; *Powers v. Smith* (1910) 3 B. W. C. C. (Eng.) 470; *Walker v. Murray* [1911] S. C. 825, 48 Scot. L. R. 741, 4 B. W. C. C. 409; *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 K. B. (Eng.) 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178 (an aged workman in colliery died from angina pectoris); *Marshall v. The Wild Rose* [1910] A. C. (Eng.) 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514, 11 Asp. Mar. L. Cas. 409, 48 Scot. L. R. 701 (sailor left his berth on a hot night to cool himself on deck; body found next morning under gunwale where members of crew sometimes sat down); *Ashley v. Lilleshall Co.* (1911) 5 B. W. C. C. (Eng.) 85; *Clarkson v. Charente S. S. Co.* [1913] W. C. & Ins. Rep. (Eng.) 422, 6 B. W. C. C. 540; *Morris v. Turford* [1913] W. C. & Ins. Rep. (Eng.) 502, 6 B. W. C. C. 606; *Thackway v.*



be proved by legitimate inference from the circumstances shown,<sup>57</sup> but the arbitrator cannot indulge in speculation as to what caused the injury;<sup>58</sup> there must be something more than guess, conjecture, or surmise,<sup>59</sup> and an award will be set aside where there is no evidence of an accident.<sup>60</sup> Whether or not the workman suffers injury by "accident" is a question of fact.<sup>61</sup>

*c. "Arising out of and in the course of the employment" (§ 1, subsec. 1).*

For the American decisions construing this phrase, see post, 232.

The statute provides that the compensation is payable only when an injury arises "out of and in the course of the employment." It is not sufficient that the injury occurs in the course of the employment, it must also arise "out of

the employment."<sup>62</sup> Since these phrases are used conjunctively, any discussion of the distinction between them is academic,<sup>63</sup> for, although there must be some difference in the meaning, yet the workman must satisfy both branches of the requirement in order to be entitled to compensation.

It is rather difficult to conceive of any injury which arises "out of" the employment, which does not arise "in the course of" it; but the converse, however, is not true, for, as is shown in many of the cases cited below, it has been held that, although the injury arose in the course of the employment, it did not arise "out of" it, and consequently no compensation is recoverable.

The determination of this question presents one most difficult problem in connection with the act. It has been

Connelly (1909) 3 B. W. C. C. (Eng.) 37; Trigg v. Vauxhall Motors [1914] W. C. & Ins. Rep. (Eng.) 251, 7 B. W. C. C. 462; White v. Sheepwash (1910) 3 B. W. C. C. (Eng.) 382.

"A workman is bound clearly to show the nature of the accident which happened to him, and that it occurred in the course of his employment." Durocher v. Kinsella (1911) Rap. Jud. Quebec 40 C. S. 459.

The burden of proof that it was the accident in question, and not the workman's previous condition, which rendered him incapacitated is upon the applicant. Shier v. Highbridge Urban Dist. Council (1908; C. C.) 1 B. W. C. C. (Eng.) 347.

<sup>57</sup> Woods v. Wilson [1913] W. C. & Ins. Rep. (Eng.) 569, 29 Times L. R. 726, 6 B. W. C. C. 750.

<sup>58</sup> In Perry v. Ocean Coal Co. [1912] W. C. Rep. (Eng.) 212, 106 L. T. N. S. 713, 5 B. W. C. C. 421, where a workman who was suffering from an old hernia died of strangulated hernia, but there was no evidence of any strain which caused the strangulation to come on, Cozens-Hardy, M. R., said: "Although a county court judge may act, and must act, and ought to act, in many cases without any direct evidence, and although he ought and in many cases must act upon indirect evidence which justifies his drawing the inference, there is nothing to justify him in that which is really a case of merely balancing up probabilities."

The widow of a workman has not discharged the burden of proof that the death of her husband was due to the accident, which rendered necessary the amputation of the index finger of his hand, where the evidence showed that, as he was recovering from the effects of the anæsthetic given for the first operation, the surgeons administered a second anæsthetic for the purpose of removing a tooth, and that he died shortly after from failure of respiration caused by the anæsthetic. Charles v. Walker (1909) 25 Times L. R. (Eng.) 609, 2 B. W. C. C. 5. L.R.A.1916A.

<sup>59</sup> Woods v. Wilson [1913] W. C. & Ins. Rep. (Eng.) 569, 29 Times L. R. 726, 6 B. W. C. C. 750.

<sup>60</sup> Langley v. Reeve (1910) 3 B. W. C. C. (Eng.) 175; Griffiths v. North's Nav. Collieries (1911) 5 B. W. C. C. (Eng.) 21.

The workman is not entitled to compensation although there was an accident, and although he is still weak, where there is nothing to connect his present weakness with the accident. Huggins v. Guest [1913] W. C. & Ins. Rep. (Eng.) 191, 6 B. W. C. C. 80.

<sup>61</sup> Johnson v. The Torrington (1909) 3 B. W. C. C. (Eng.) 68.

<sup>62</sup> Fitzgerald v. Clarke [1908] 2 K. B. (Eng.) 796, 1 B. W. C. C. 197. Buckley, L. J., said: "The words 'out of and in the course of the employment' are used conjunctively, and not disjunctively, and, upon ordinary principles of construction, are not to be read as meaning 'out of,' that is to say, 'in the course of.' The former words must mean something different from the latter words. The workman must satisfy both the one and the other."

<sup>63</sup> "The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." Ibid. (Eng.)

In Kennedy v. Grand Trunk P. R. Co. (1913) 7 B. W. C. C. (Sask.) 1046, in the supreme court of Saskatchewan, Elwood J., quoted with approval the above statement from the judgment of Buckley, L. J.

said that each case must depend upon its own circumstances,<sup>64</sup> and cannot be solved by reference to any formula or general principle.<sup>65</sup>

It may be stated generally that the phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business. While a general state-

ment of this character would undoubtedly be subscribed to by all the courts having occasion to pass upon this question, nevertheless there is great difficulty in applying it to the particular facts arising in the individual cases.

The risk must be one peculiarly incident to the employment,<sup>66</sup> and not one incurred by everyone, whether in the employment or not.<sup>67</sup> Where an injury occurs upon a street from causes to which all persons upon the street are exposed, it cannot be said to arise out

<sup>64</sup> *M'Laren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492, citing *Haley v. United Collieries* [1907] S. C. 216, 44 Scot. L. R. 584.

<sup>65</sup> *M'Laren v. Caledonian R. Co.* (Scot.) supra; *Pritchard v. Torkington* [1914] W. C. & Ins. Rep. (Eng.) 271, 7 B. W. C. C. 719.

The question whether or not the accident arose out of and in the course of the employment cannot be solved by phrases. *Watkins v. Guest* (1912) 106 L. T. N. S. (Eng.) 818, 5 B. W. C. C. 307.

<sup>66</sup> *Fitzgerald v. Clarke* [1908] 2 K. B. (Eng.) 796, 99 L. T. N. S. 101, 77 L. J. K. B. N. S. 1018, 1 B. W. C. C. 197.

A taxi-cab driver who was ordered to drive an officer during the night to a fort near Plymouth, and who was shot by a sentry on failing to respond to a challenge which he did not hear because of the glass screen and the noise made by the engine and wind and rain, may be held to be injured by accident arising out of and in the course of his employment, since he was exposed to a special risk. *Thorn v. Humm* (1915) 31 Times L. R. (Eng.) 194, 8 B. W. C. C. 190.

A sailor injured while washing his clothes in a dark alleyway, by falling down a half-open hatchway, suffers injury by accident arising "out of and in the course of his" employment. *Cokolon v. The Kentra* (1912) 5 B. W. C. C. (Eng.) 658. The work of washing his own clothes was said to be incidental to the employment of a sailor, and the county court judge had found that he was not doing the work in an improper place.

Where a workman employed in a stable was bitten by the stable cat while eating his dinner, the court held that the injury was incidental to the employment. *Rowland v. Wright* (1908) 77 L. J. K. B. N. S. (Eng.) 1071, 24 Times L. R. 852, [1909] 1 K. B. 963, 99 L. T. N. S. 758, 1 B. W. C. C. 192.

Injuries to a ship carpenter by being burned from a fire caused by a shore laborer who after lighting a cigarette threw the match, while yet burning, into some shavings, are caused by accident arising out of the employment, since the carpenter was, by his employment, required to work among shavings, and had gotten oil upon his trousers in the course of his work. *Manson v. Forth & C. S. S. Co.* 50 Scot. L. L.R.A.1916A.

R. 687, [1913] S. C. 921, [1913] W. C. & Ins. Rep. 399, 6 B. W. C. C. 830.

An insurance collector who, while on his rounds, slipped on a stair and injured his left side, shoulder, and arm, suffered an accident arising out of his employment, as well as in the course of it. *Millar v. Refuge Assur. Co.* [1912] S. C. 37, 49 Scot. L. R. 67, 5 B. W. C. C. 522. The Lord President distinguished between accidents brought on by the employment, and accidents which may happen to anybody.

A brakeman who, after leaving the engine upon which he was riding, was killed while crossing the tracks to make a connection between another car and the engine, suffered injury from a risk peculiarly incidental to his employment. *Kennedy v. Grand Trunk P. R. Co.* (1913; Sask.) 7 B. W. C. C. 1046.

<sup>67</sup> Where a workman while driving an engine on his employer's farm was stung by a wasp, and died from blood poisoning the risk is not one peculiarly incident to the employment. *Amys v. Barton* [1912] 1 K. B. (Eng.) 40, [1911] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 124.

The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity, and it is altogether impossible to say that the alarm caused to the applicant by the flight of the cockchafer, followed by her putting her thumb into her eye, was something which arose outside of her employment. *Craske v. Wigan* [1909] 2 K. B. (Eng.) 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560. *Cozens-Hardy, M. R.*, said: "I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the court of appeal since these acts came into operation, namely, to hold that it is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place.' He must go further, and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'"

Where a workman got harmless dust into his eye, and by rubbing it caused an abrasion, and thereafter a microbe, from some



of the employment of the injured workman.<sup>68</sup> But it has been said that the criterion is not that other persons are exposed to the same danger; but, rather, that the employment renders the workman peculiarly subject to the danger; and recovery has been allowed in several cases where the workman was injured while on the street from a risk to which the members of the public generally were exposed, but to which the workman was peculiarly exposed because of the fact that he was obliged to go out upon the street almost continually.<sup>69</sup> And the fact that the man was not regularly re-

quired to go upon the street at regular intervals, but only from time to time as the necessity arose, has been held to be immaterial.<sup>70</sup>

One division of the court of session has held that where a workman was injured while engaged in erecting a stone-planing machine in an open yard by being struck by a slate blown off the roof of an adjoining store, and, owing to the stooping position which he was obliged to take to perform his work, was unable to see the slate coming, the finding of the arbitrator that he was injured by accident arising out of and in the course

source not connected with the employment, entered the eye and set up inflammation, the county court judge was justified in holding that the employers were not liable to compensation for the resulting incapacity. *Bellamy v. Humphries* [1913] W. C. & Ins. Rep. (Eng.) 169, 6 B. W. C. C. 53.

An injury to a workman in a spinning mill while removing his socks in order to do his work better is not one arising out of and in the course of his employment. *Peel v. Laurence* [1912] W. C. Rep. (Eng.) 141, 106 L. T. N. S. 482, 28 Times L. R. 318, 5 B. W. C. C. 274. *Buckley, L. J.*, said: "If there be any risk in a man taking off his own socks, it is a risk common to all who wear them. It is no greater to a man who works in a spinning mill, than to one who does not work in a spinning mill."

An accident to a workhouse keeper, caused by his falling down the steps leading to his private rooms, a fit of coughing having made him giddy while he was sitting on the steps, does not arise out of and in the course of his employment, where he was suffering from tuberculosis, which made him cough. *Butler v. Burton-on-Trent Union* [1912] W. C. Rep. (Eng.) 222, 106 L. T. N. S. 824, 5 B. W. C. C. 355. The statement was made that there was nothing peculiar to the employment which rendered the risk greater than that to which other persons were subjected.

<sup>68</sup> A janitor, who in the course of his employment, takes a message from one headmaster to another and while on the street is overcome with the heat does not suffer an accident arising out of and in the course of his employment. *Rodger v. Paisley School Bd.* [1912] S. C. 584, [1912] W. C. Rep. 157, 49 Scot. L. R. 413, 5 B. W. C. C. 547.

A painter's laborer who was obliged to cross a street to obtain some paint and while so crossing the street was knocked down by a tram car, does not suffer injury by accident arising out of and in the course of the employment, since this was merely a street accident, to which all persons were subjected. *Symmonds v. King* (1915) 8 B. W. C. C. (Eng.) 189.

A charwoman sent by her employer to post a letter, who fell and broke her leg while going to the postoffice is not entitled L.R.A.1916A.

to compensation since she was not exposed to some special risk greater than that imposed on other persons. *Sheldon v. Needham* (1914) 30 Times L. R. (Eng.) 590, 58 Sol. Jo. 652, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C. 471.

<sup>69</sup> As, where the workman was a salesman and collector, and in the course of his duty was riding a bicycle, and was kicked by a horse. *M'Neice v. Singer Sewing Mach. Co.* [1911] S. C. 12, 48 Scot. L. R. 15, 4 B. W. C. C. 351.

And where a canvasser and collector, while riding his bicycle in the course of his employment, collided with a tram-car and was killed. *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. (Eng.) 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242.

A workman whose duty as a drayman involves his being, from 8 o'clock in the morning until 8 at night, more or less constantly in the streets of London, is more exposed to the risk of being knocked down by a motor car than other members of the general public. *Martin v. Lovibond* [1914] 2 K. B. (Eng.) 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 76, 7 B. W. C. C. 243, 5 N. C. C. A. 985.

The *Pierce* and *M'Neice* Cases were distinguished in *Greene v. Shaw* [1912] 1 I. R. 480, [1912] W. C. Rep. 25, 46 Ir. Law Times, 18, 5 B. W. C. C. 573, where the workman was obliged to go but once or twice a day over a quiet country road.

The manager of a branch store who once a week rides his bicycle, for a distance of 2 miles to another branch store in order to submit his books to inspection, and, while riding his bicycle, slips and falls and is injured, does not suffer injury by accident arising out of and in the course of the employment, since he is not exposed to any greater risk than any other member of the public. *Slade v. Taylor* [1915] W. C. & Ins. Rep. (Eng.) 53, 8 B. W. C. C. 65.

<sup>70</sup> Injury to a coachman who, with the knowledge of the employer, rode a bicycle to a postoffice to call for a letter, and who was injured by a man lurching against the bicycle and upsetting it, arose out of the

of his employment would not be disturbed.<sup>71</sup> The court said that this case was one of the class where a workman was injured by accident arising out of a state of circumstances to which all persons are more or less exposed, but that, as the arbitrator had found that the position which the workman must necessarily occupy in connection with his work resulted in excessive exposure to the common risk, it was open to the conclusion that the accident did not arise out of the common risk, but out of the employment. The other division subsequently held that a carter who, while leading a horse attached to a lorry, out of his employer's barn, was struck by a piece of iron blown off from an adjoining roof, was not injured by accident arising out of the employment.<sup>72</sup> This case was distinguished from the other upon the ground that the injured employee was subject to an ordinary risk, and the nature of his employment was not such as to render him more liable to injury than to a person not in the employment. Lord Dundas said, however, that he confessed to find it very difficult to point to any really substantial or satisfactory distinction between the two cases. The English court of appeal has rendered a decision similar to that in the latter case.<sup>73</sup>

Whether injuries caused by the weather or climatic conditions arise out of the employment is a question which has frequently been before the court, and the decisions are not entirely harmonious. Where the character of the work renders the workman peculiarly subject to the injury in question, it is usually held that it arises out of the employment; as, where a sailor exposed to the heat of a tropical country suffers a sunstroke,<sup>74</sup> and where workmen engaged in the hold of a vessel at work near the furnaces or a boiler, because of the great heat suffers from heat stroke.<sup>75</sup> But on the other hand it has been held that a plumber whose vitality was impaired, and who was engaged on a hot day in laying and joining pipe in a trench, and suffered a stroke of heat apoplexy, was not injured by accident, although his work required considerable stooping.<sup>76</sup> So, too, it has been held that a journeyman baker whose hand and arm were frostbitten while on his rounds, was not exposed to such an injury any more than any other outside laborer.<sup>77</sup>

Injury by lightning has been held to arise out of the employment, in a case in which the workman, because of the character of his place of work, was peculiarly liable to be struck.<sup>78</sup> But a workman on the street is no more like-

employment; and the fact that the coachman might have been required to go to the postoffice every day, or might not be obliged to go for a fortnight, is immaterial. *Bett v. Hughes* (1914) 52 Scot. L. R. 93, [1915] S. C. 150, 8 B. W. C. C. 362.

<sup>71</sup> *Anderson v. Adams* [1913] W. C. & Ins. Rep. 506, 50 Scot. L. R. 855, 6 B. W. C. C. 874.

<sup>72</sup> *Kinghorn v. Guthrie* [1913] S. C. 1155, [1913] W. C. & Ins. Rep. 509, 50 Scot. L. R. 863, 6 B. W. C. C. 887.

<sup>73</sup> A workman who, while engaged in work in a mill yard, is struck on the back by a substance thrown from one of the upper windows of the mill, does not suffer injury by accident arising out of the employment. *Bateman v. Albion Combing Co.* [1914] W. C. & Ins. Rep. (Eng.) 18, 7 B. W. C. C. 47.

<sup>74</sup> An ordinary seaman who, while engaged in painting the sides of a vessel lying in a port off the Mexican coast, was seized with sunstroke, is injured by accident arising out of his employment. *Morgan v. The Zenaida* [1909] 25 Times L. R. (Eng.) 446.

In *Davies v. Gillespie* (1911) 105 L. T. N. S. (Eng.) 494, 28 Times L. R. 6, 56 Sol. Jo. 11, 5 B. W. C. C. 64, it was held that the county court judge might find that a workman who was obliged to stand on the blackened steel deck of a vessel, leaning over a hatchway, from 6 A. M. to 11 A. M., at a harbor in Haiti, and who suffered from ex-L.R.A.1916A.

posure to the sun, was more exposed by reason of his occupation than other persons would have been, and that the injury arose out of his employment.

<sup>75</sup> *Ismay v. Williamson* [1908] A. C. 437, 42 Ir. Law Times, 213, 1 B. W. C. C. 232, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713.

An engineer in the engine room on a steamship in the tropics, who suffers a heat stroke and subsequently dies, is killed by accident arising out of the employment. *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. (Eng.) 428.

<sup>76</sup> *Robson v. Blakey* [1912] S. C. 334, 49 Scot. L. R. 254, [1912] W. C. Rep. 86, 5 B. W. C. C. 536.

<sup>77</sup> *Warner v. Couchman* [1911] 1 K. B. (Eng.) 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693 [1910] W. N. 266, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51, affirmed in H. L. [1911] W. N. 220, 81 L. J. K. B. N. S. 45, 28 Times L. R. 58, 56 Sol. Jo. 70.

<sup>78</sup> Injury to a bricklayer on a scaffolding 23 feet high, by lightning, may be said to be caused by an accident arising out of the employment. *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. (Eng.) 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429. It was pointed out that ordinarily the case of a workman being struck by lightning would be typical of an accident



ly to be struck by lightning than any other person, and consequently no compensation is recoverable for injuries from such a cause.<sup>79</sup>

A miner who was killed by a snow slide while taking refuge in a shelter provided for miners in severe weather suffered an accident arising out of the employment, where his place of work and the shelter were within the zone of danger from snow slides, although the slide in question was an extraordinary or abnormal event.<sup>80</sup>

In order that the injury may be one

arising altogether outside of the employment, but that in the case at bar the workman's position exposed him to more than a normal risk.

<sup>79</sup> In *Kelly v. Kerry County Council* (1908) 42 Ir. Law Times, 23, 1 B. W. C. C. 194, it was held that the death of a workman who was killed by lightning while at work on a street keeping the outlets and gulleys clear, so as to prevent the street from being flooded, was not due to an accident arising "out of and in the course of" the employment. After referring to *Andrew v. Failsworth Industrial Soc.* (Eng.) supra, the county court judge said: "But I am unable to find any special or peculiar danger from lightning to which these men were exposed from working on the road. No expert or other evidence was offered to me that their position on the road exposed them to any greater risk of being struck by lightning than if they had been working in a field or a garden or a factory. The antecedent probability that they would be struck by lightning was no greater in their case than it was in the case of any other person who was within the region over which the thunderstorm passed." The county court judge was unanimously sustained by the Irish court of appeal.

<sup>80</sup> *Culshaw v. Crow's Nest Pass Coal Co.* (1914; B. C.) 7 B. W. C. C. 1050.

<sup>81</sup> Compensation was denied where a workman was injured while mounting an empty cart to ride from one of his employer's farms to another, it being his duty to go, but he having no duty in connection with the cart. *Parker v. Pout* (1911) 105 L. T. N. S. (Eng.) 493.

And where a domestic servant who was drying her hair outside the door of her employer's house was directed to come in and take charge of a baby in a cradle close to a fire, and, while performing this duty, continued the operation of drying her hair, and was fatally injured through her sleeve catching fire. *Clifford v. Joy* (1909) 43 Ir. Law Times, 192. *Fitzgibbon, L. J.*, said: "The risk of taking fire while engaged in drying her hair was one not within the scope of her employment."

<sup>82</sup> A workman sent to get a postoffice order at a certain station, who, on failing to get it there, went some half mile further, to the general postoffice, went outside of his employment, and cannot recover for L.R.A.1916A.

arising out of the employment, the workman must be acting within the scope of his employment at the time of his injury; <sup>81</sup> compensation will be denied where the danger was voluntarily incurred in doing acts wholly outside of the scope of the employment,<sup>82</sup> or where at the time of the injury, the workman was doing work for a person, other than his employer,<sup>83</sup> or doing the work of other employees.<sup>84</sup> But the mere fact that at the time of the injury the workman had changed places with another workman will not prevent a recovery,

injuries received by slipping at the post-office. *Smith v. Morrison* (1911) 5 B. W. C. C. (Eng.) 161.

An injury to the arm of a house surgeon in a hospital, caused by his voluntarily exposing his arm to X-rays, does not arise "out of and in the course of" his employment. *Curtis v. Talbot & K. Infirmary Committee* (1911) 5 B. W. C. C. (Eng.) 41.

<sup>83</sup> A carter whose duty it was to deliver by lorry certain bags at a warehouse, and to make such deliveries by slinging the bags on to the consignee's tackle, but who had no duty to receive or throw the bags inside the warehouse, cannot recover compensation for injuries received while assisting in slinging bags on another lorry, the carter of which was, under an engagement with the consignee, engaged in stowing the bags away in the warehouse. *Sinclair v. Carlton* [1914] 2 Scot. L. T. 105, [1914] S. C. 871, 51 Scot. L. R. 759, 7 B. W. C. C. 937. The evidence in this case showed that the carters had made an arrangement with the consignee whereby they were to aid in stowing away the bags, and for this work were to receive additional compensation from the consignee.

A workman employed by the proprietor of a theater to clean it is not entitled to compensation from his employer, when he is injured while carrying the baggage of a theatrical troupe to a station under a contract entirely distinct from his contract with the owner of the theater. *Huscroft v. Bennett* (1914) 110 L. T. N. S. (Eng.) 494, [1914] W. C. & Ins. Rep. 9, 58 Sol. Jo. 284, 7 B. W. C. C. 41.

<sup>84</sup> A roadman in the employment of a country road authority, whose employment was solely to sweep and put "blinding" on the road, was not injured by accident arising "out of and in the course of" his employment, where he was injured when stepping down from a steam road roller belonging to the employers, upon which he had gone for the purpose of breaking up the boiler fire so as to get up steam by 7 A. M., under an arrangement with the engineman to break up the fire so as to save the engineman and fireman, who had gone to their homes for the night, from returning before 7 A. M. *M'Allan v. Perthshire County Council* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 783.

where the change of employment was done with the knowledge of the employer.<sup>85</sup> And a carter driving towards his employers' yards, who was injured while standing up in his place in order to give a lift to a fellow workman, suffered injury by accident arising out of and in the course of his employment, where there was evidence that the employers knew of his practice of giving lifts to fellow servants, and permitted it.<sup>86</sup> Nor will recovery be denied where a workman was injured while doing the work for another employee, if it was necessary that such work be done in

order that his own work might progress.<sup>87</sup> So a fireman whose duty it was to keep up the steam in an engine did not go outside of his duty in attempting to put back upon the pulley a belt by means of which the fuel was carried to him, where the employee whose duty it was to attend to the belt was temporarily absent from his post of duty.<sup>88</sup> So, an employee is not necessarily outside of his employment in going to the assistance of other employees so as to further the business of the employers.<sup>89</sup>

There can be no recovery where the injury was received by the workman

<sup>85</sup> A workman engaged in unloading a ship is not outside of his employment in changing work with another workman, which was customarily done, with the knowledge of the employers. *Henneberry v. Doyle* [1912] 2 I. R. 529, [1912] W. C. Rep. 145, 46 Ir. Law Times, 70, 5 B. W. C. C. 580.

Where a lad of nineteen is employed to help in threshing operations, he does not leave the employment by changing works with another boy, where it is done with the knowledge of the employer's bailiff. *Cambrook v. George* (1903; C. C.) 114 L. T. Jo. (Eng.) 550, 5 W. C. C. 26.

<sup>86</sup> *Evans v. Holloway* (1914) 7 B. W. C. C. (Eng.) 248, [1914] W. C. & Ins. Rep. 75.

<sup>87</sup> A drawer in a pit may be found to have been injured by an accident arising out of and in the course of his employment, although he was injured in performing work which it was the duty of other employees to do, where it appeared to be customary for the drawers to do the work in question when the other employees were absent, and it was found that such other employees were frequently absent from a quarter of an hour to an hour, so that if the workman had not performed this work his own work would have been seriously interrupted. *Baird v. Robson* (1914) 51 Scot. L. R. 747, 2 Scot. L. T. 92, 7 B. W. C. C. 925.

<sup>88</sup> *McCormick v. Kelliher Lumber Co.* (1913; B. C.) 7 B. W. C. C. 1025. The court said: "Surely the putting on of the belt for the purpose of starting the carriers to convey the fuel to the point where it would be utilized for the purpose of keeping up steam, the very purpose for which he was employed, was an act within the scope of his employment, in the sense that it was incidental to it; and although his defined duty may not have included the adjusting of this belt, it was an act done in the interest of the master and in the furtherance of the work he was employed to do."

<sup>89</sup> In *Seller v. Boston Rural Dist. Council* (1914) 7 B. W. C. C. (Eng.) 99, the court apparently took the view that a roadman whose work consisted in seeing that the road was cleared of loose stones after they had been deposited in a heap at the side L.R.A.1916A.

on being unloaded from a traction engine, did not go outside of his employment in helping to free one of the traction engine's trucks which had gotten stuck in a ditch; but the case was sent back upon another point.

An injury to a casual laborer who had been employed by a farmer to assist in threshing arose out of and in the course of his employment by the farmer, although the injury occurred after the threshing had been finished and the farmer had paid the laborer, and while the latter was assisting in moving the machine off of the premises to the road, where it is usual and customary for the casual laborers who follow a threshing machine in expectation of being taken on by farmers to assist in the threshing, to help in getting the engine and machine from the road to the stack and back again, and such help is frequently necessary. *Newson v. Burstall* (1915) 84 L. J. K. B. N. S. (Eng.) 535, 112 L. T. N. S. 792, 50 L. J. 54, [1915] W. C. & Ins. Rep. 16, 59 Sol. Jo. 204, 8 B. W. C. C. 21.

Where a clerk employed at engineering works, whose duty was confined to weighing and recording all articles sent out from the works, met with an accident which resulted in his death while helping workmen to carry a heavy article to the weighing machine, the accident arose out of and in the course of the clerk's employment, in the sense of the act. *Goslan v. Gillies* [1906-07] S. C. (Scot.) 68.

A laborer injured while giving assistance to a machine man, in replacing some loose belting while the machine was in motion, was held entitled to recover in *Menzies v. McQuibban* (1900) 2 Sc. Sess. Cas. 5th series, 732, 37 Scot. L. R. 526, 7 Scot. L. T. 432.

A man employed as a common workman to shovel clay from a pit on to a car may recover for injuries which he received, while upon his way to work, by stopping to assist a fellow workman to replace upon the track one of the cars used to carry the clay, although he was not directed by any foreman or superior workman to aid in replacing the car. *Ferguson v. Brick & Supplies* (1914; Alberta) 7 B. W. C. C. 1054.

A workman whose duty it was to attend a gate and a telephone, and to do what



while doing some act wholly for his own benefit, which was not designed in any way to promote the work of the employer. Numerous cases in which this principle has been applied to various

situations are set out in the note below.<sup>90</sup>

Compensation will not be allowed where a workman goes to satisfy the requirements of nature into a dangerous

was necessary in case of accidents, did not go outside of his employment in going to the aid of slaters who had met with an accident, although the slaters were not in the employ of the employer, but were engaged in doing work for him on the premises. *Aitken v. Finlayson* [1914] S. C. 770 (1914) 2 Scot. L. T. 27, 51 Scot. L. R. 653, 7 B. W. C. C. 918.

<sup>90</sup> "I think if a man, for his own purposes, deliberately goes away from the place where he was employed, and meets with an accident on the way back before he reaches the point where he should be to do his duty, the judge is justified in finding *prima facie* that the accident did not arise in the course of his employment." *Cozens-Hardy, M. R.*, in *Warren v. Hedley's Colliery Co.* (1913) 6 B. W. C. C. (Eng.) 136.

An engine driver who goes across the rails to a signal box to inquire the time for his own purposes, when his proper path does not cross the rails at all, is not in the course of his employment. *Benson v. Lancashire & Y. R. Co.* [1904] 1 K. B. (Eng.) 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 243, 89 L. T. N. S. 715, 20 Times L. R. 139.

A steward of a ship who was authorized to go on shore to the stores of the company, and who while on shore was permitted to go to his home, cannot recover compensation for injuries received at a point between his home and the stores, since such injury was received at a time when he was not acting within the scope of his employment. *Lee v. The St. George* [1914] W. C. & Ins. Rep. (Eng.) 17, 7 B. W. C. C. 85.

A stoker is not in the course of his employment when, having been paid wages belonging to another workman, he, in order to give the wages to the workman, goes to the engine on which he is at work, and attempts to mount it while in motion. *Williams v. Wigan Coal & I. Co.* (1909) 3 B. W. C. C. (Eng.) 65.

Nor was an engine driver who got down from his engine, and crossed a siding to receive a book from a friend, and was struck by some trucks being shunted on the siding. *Reed v. Great Western R. Co.* [1908] W. N. (Eng.) 212, affirmed in [1909] A. C. (Eng.) 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31.

Nor was a workman who, being sent on an errand, took about two hours to go a mile, and was injured as he was finishing his journey. *Bates v. Davies* (1909; C. C.) 126 L. T. Jo. (Eng.) 454, 2 B. W. C. C. 459.

A workman injured while placing a pail near his machine for the purpose of using it to spit into is not injured by accident arising out of and in the course of his employment, within the meaning of the British L.R.A.1916A.

*Columbia statute. Sealzo v. Columbia Macaroni Factory* (1912) 17 B. C. 201, 6 B. W. C. C. 945.

A cartman who in drawing his load goes off the regular route for his own purposes, and is injured, while so off the route because the horse runs away, does not suffer injury by accident arising out of and in the course of his employment. *Everitt v. Eastaff* [1913] W. C. & Ins. Rep. (Eng.) 164, 6 B. W. C. C. 184.

There can be no recovery, where a collier who was employed to hew coal in a particular part of a mine deliberately and for his own advantage went to a different part of the mine and was injured. *Weighill v. South Hetton Coal Co.* [1911] 2 K. B. (Eng.) 757, note.

Nor where a dock employee jumped onto railway wagon for a lift home. *Morrison v. Clyde Navigation* [1909] S. C. 59, 46 Scot. L. R. 40.

Nor where an injury was received by a ticket collector while riding on the foot-board of a train for his own pleasure, and not for any object of his employment. *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. (Eng.) 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64. The court emphasized the point that, to render an employer liable to pay compensation, the accident must arise, not only "out of," but also "in the course of," the employment.

An injury to a workman employed by a farmer, upon the day he was to begin his work, and while he was using the farmer's horse and cart to fetch his box from the station, did not arise out of and in the course of his employment, although it was a term of the employment that he could have a horse and cart to convey his box from the station to the farmer's house. *Whitfield v. Lambert* (1915) 112 L. T. N. S. (Eng.) 803, *Swinfen Eady, L. J.*, said that "the applicant was merely using the respondent's horse and cart with leave and license, as it was agreed he should be at liberty to do. He was going on his own business, and not on the farmer's business. The accident did not, therefore, arise 'out of' his employment."

Where a miner voluntarily stood in water for about half an hour in order to be among the first to go up in the cage, when he might have stood on dry ground and reached the cage comparatively dry, his resulting incapacity cannot be said to result from an injury by accident arising out of the course of his employment. *McLuckie v. Watson* [1913] S. C. 975, [1913] W. C. & Ins. Rep. 481, 50 Scot. L. R. 770, 6 B. W. C. C. 850.

A workman who, in order to conceal from the night shift of workmen a tin of milk used by him in his tea during the time al-

and unauthorized place, or on premises not under the control of the employer.<sup>91</sup> But in one case an award was upheld where there was some evidence justifying the finding of the arbitrator that the workman acted in an emergency.<sup>92</sup>

There can be no recovery of compen-

sation where the injury is received while the workman himself or his fellows are indulging in horse play.<sup>93</sup> In two Scotch cases, apparently conflicting decisions have been rendered in cases in which one workman was trying to take away an appliance from another workman.<sup>94</sup>

lowed by the employer for tea, attempts to put it on a ledge in close proximity to a reciprocating plant, and is injured while so doing, does not suffer accident by injury arising out of and in the course of his employment. *Keen v. St. Clement's Press* (1914) 7 B. W. C. C. (Eng.) 542.

Where a fish porter in the employment of a fish stevedore who had a contract with a railway company for the portage of fish delivered at one of their stations left the siding where the trucks were customarily discharged, and went along the line of railway for a purpose not connected with his employment, and was run down and killed by a railway engine, he was not killed through an accident arising "out of and in the course of" his employment. *Hendry v. Caledonian R. Co.* (1906-07) S. C. (Scot.) 732.

A collier was not injured by accident arising "out of and in the course of" his employment, where he went, on the day following the receipt of his paynote, to protest against the amount thereof, with the intention of quitting the employment unless it was adjusted, and, on failing to receive satisfaction, was injured while leaving the place. *Phillips v. Williams* (1911) 4 B. W. C. C. (Eng.) 143. The court took the view that he went onto the premises solely for his own purpose.

An injury to a hall porter in a club house did not arise out of and in the course of his employment, where it was received while he was attempting to enter the club house by a window at a late hour of the night, after the time when he was supposed to have returned. *Watson v. Sherwood* (1909; C. C.) 127 L. T. Jo. (Eng.) 86, 2 B. W. C. C. 462.

<sup>91</sup> As where a workman deliberately went into a dangerous place. *Rose v. Morrison* (1911) 80 L. J. K. B. N. S. (Eng.) 1103, 105 L. T. N. S. 2, 4 B. W. C. C. 277.

Or where a workman went, into a dangerous place, when the places provided by the employer were in good order and close at hand. *Thomson v. Flemington Coal Co.* [1911] S. C. 823, 48 Scot. L. R. 740, 4 B. W. C. C. 406.

A miner who voluntarily went into a deserted portion of the mine from which the timbering has been removed, is not in the employment, where places have been provided for the miners in close proximity to his place of work. *Cook v. Manvers Main Collieries* (1914) 7 B. W. C. C. (Eng.) 696.

Where a workman leaves the sphere of his employment, and goes onto private property where the employers cannot probably follow him, even if they so wish, the L.R.A.1916A.

employers cannot be held liable for injuries received while he is there. *Cogdon v. Sunderland Gas Co.* (1907; C. C.) 1 B. W. C. C. (Eng.) 156.

<sup>92</sup> The death of a miner who after receiving his lamp at the lamp cabin, goes to answer a call of nature at a place sometimes used by the miners in cases of emergency, and is killed on a siding over which he must pass, is caused by accident arising "out of and in the course of" his employment, although other places have been provided for the use of the men by the mine owners. *Lawless v. Wigan Coal & I. Co.* (1908) 124 L. T. Jo. (Eng.) 532, 1 B. W. C. C. 153. The county court judge said that the inference could be drawn that the deceased went to this unauthorized place as a matter of necessity, and not of choice.

<sup>93</sup> As where a domestic servant, while in the course of her duties, was struck on the eye and blinded by an India rubber ball thrown at her in play by a fellow servant. *Wilson v. Laing* [1909] S. C. 1230, 46 Scot. L. R. 843.

And where a lad set to clean a machine at rest was injured by the starting of the machine, caused by him and another lad, while they were playing around it. *Cole v. Evans* (1911) 4 B. W. C. C. (Eng.) 138.

And where the injury was caused by the plaintiff's fellow workmen, who at the time were not engaged in their work, but were indulging in horse play. *Falconer v. London & G. Engineering Co.* (1901) 3 Sc. Sess. Cas. 5th series, 564, 38 Scot. L. R. 381, 8 Scot. L. T. 430.

And where two boys in a candy factory were scuffling over a pair of shears, and the eye of one was destroyed. *Doyle v. Moirs*, (1915) 48 N. S. 473.

Where a workman tapped another with a rule on the back, and received a push in return, from which he fell and was injured, the injury does not result from accident arising out of and in the course of the employment. *Wrigley v. Wilson* [1913] W. C. & Ins. Rep. (Eng.) 145, 6 B. W. C. C. 90.

In *Fitzgerald v. Clarke* [1908] 2 K. B. (Eng.) 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, no compensation was allowed where other employees fastened a hook and chain attached to a hoist to a collar of a workman's coat, and hoisted him to a height of 50 feet, when he fell, seriously injuring himself.

See also *Mullen v. Stewart* [1908] S. C. (Scot.) 991, 1 B. W. C. C. 204, cited in note 23, *infra*.



An injury occurring while the employee was riding a bicycle has been held to arise out of the employment, where the use of the bicycle was to further the master's business, which could be done better by the use of the bicycle.<sup>95</sup> But if it is used merely to accommodate the workman, a different rule prevails.<sup>96</sup>

Ordinarily where workmen are not

employed to work with machinery or in close proximity thereto, they are held not entitled to compensation for injuries received where they voluntarily put themselves in a position to be injured thereby, the theory being that they thereby subject themselves to dangers not incident to the work which they are employed to do.<sup>97</sup> An accident does not arise out of the employment if, at the

<sup>94</sup> Where a workman in the employment of ship builders was oiling a machine at which he was working with a brush which was not the one belonging to the machine, and another workman came up, and, claiming the brush as his, pulled it away from the claimant, and in so doing injured the latter's hand, the injury was caused by accident arising out of and in the course of the employment. *M'Intyre v. Rodger* (1903) 6 Sc. Sess. Cas. 5th series, 176, 41 Scot. L. R. 107, 11 Scot. L. T. 467.

An employee in a mine who, while endeavoring to obtain possession of a hutch from two other workmen who had taken it for their own use, suddenly turned his head to avoid a handful of dust and rubbish which one of the others had thrown at him, and came in contact with the side of the passage, injuring himself, did not suffer injury from accident arising "out of" his employment. *Baird v. Burley* [1908] S. C. 545, 45 Scot. L. R. 415, 1 B. W. C. C. 7.

In commenting upon this case, Lord Dundas, in *Shaw v. MacFarlane* (1914) 52 Scot. L. R. 236, 8 B. W. C. C. 382, said: "In *Burley's Case* it may be said that the Lord Justice-Clerk's opinion, so far as based upon the ground that 'what caused the injury was not in any sense an accident, but was a fault by a wrongdoer who was acting in a wilful and unjustifiable manner,' cannot, looking to the subsequent march of judicial decision, now be supported as sound law."

<sup>95</sup> As where a salesman and collector while riding a bicycle in pursuit of his employment was kicked in the knee by a passing horse. *M'Neice v. Singer Sewing Mach. Co.* [1911] S. C. 13, 48 Scot. L. R. 15, 4 B. W. C. C. 351.

And where a canvasser and collector who with the knowledge of his employer, but not at his direction, rode a bicycle, and was struck and killed by a tram car. *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. (Eng.) 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242.

In *Greene v. Shaw* [1912] 1 I. R. 480 [1912] W. C. Rep. 25, 46 Ir. Law Times, 18, 5 B. W. C. C. 573, it was held that a herdsman who in going from one farm to another, upon both of which he was employed, used a bicycle, and was injured while so riding, was not injured by accident arising out of his employment. *Pierce v. Providence Clothing & Supply Co.* (Eng.) was distinguished upon the ground that in the latter *L.R.A.1916A.*

case the workman was continually exposed to the danger of the road, while in the *Greene Case* he was obliged to go over the road but once or twice a day, and consequently the risk incurred by the workman was no greater than that incurred by many other persons using the street. The decision in this case cannot be said to be very satisfactory. All of the judges delivered judgment, and each referred to the case of *Kitchenham v. The Johannesburg* [1911] A. C. (Eng.) 417, 27 Times L. R. 504, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 55 Sol. Jo. 599, 4 B. W. C. C. 311, which was a case of a seaman who had gone on shore with leave, and while returning to his ship fell from the wharf and was drowned. It did not appear that he had reached the gangway. The Lord Chancellor took the view that in the case of a seaman falling from a wharf while walking to his ship, the falling into the water was a risk common to everyone. If the *Kitchenham Case* (Eng.) is controlling on the facts shown in *Greene v. Shaw (Ir.)* it would also seem to be controlling in the case of *Pierce v. Providence Clothing & Supply Co.* (Eng.)

<sup>96</sup> A workman who had been engaged to load a van, and was promised employment in unloading it if he was at the place of unloading in time, was not in the employment while riding on his bicycle from one place to the other. *Perry v. Anglo-American Decorating Co.* (1910) 3 B. W. C. C. (Eng.) 310.

A workman riding a bicycle to his home after his work has been completed is not within the employment, although the bicycle is furnished to him by the employers for use in his work. *Edwards v. Wingham Agri. Implements Co.* [1913] 3 K. B. (Eng.) 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50, [1913] W. N. 221, 57 Sol. Jo. 701, [1913] W. C. & Ins. Rep. 642, 6 B. W. C. C. 511. The court pointed out that the fact that the employer permitted the workman to ride the bicycle home did not render him in the employment.

Employers are not liable for compensation for the death of a workman which occurred while he was riding on a bicycle, due to the collapse of the bicycle, where the use of such a vehicle was not necessary to the business, and was not known to or acquiesced in by the employers, and the journey in the course of which the accident happened was undertaken by him for his own purposes, rather than for the business

time, the workman is arrogating to himself duties which he was neither engaged nor entitled to perform.<sup>98</sup> But the courts are inclined not to be too severe upon workmen who are injured by attempts to further the master's business, although the attempt is in a line some-

what outside the precise scope of the employment.<sup>99</sup>

Injuries received while workmen other than train employees are attempting to mount or get off moving trains or other vehicles do not arise out of the employment.<sup>1</sup> But a different rule would prob-

of the employer. *Butt v. Provident Clothing & Supply Co.* [1913] W. C. & Ins. Rep. (Eng.) 119, 6 B. W. C. C. 18.

<sup>97</sup> An assistant porter in a hospital, who attempts to dust the lift (which he has never been told to do), and is injured while so doing, is not injured by accident arising out of and in the course of the employment. *Whiteman v. Clifden* [1913] W. C. & Ins. Rep. (Eng.) 126, 6 B. W. C. C. 49.

A boy sixteen years of age, employed as a box minder in a woolen mill, who, although he knew it was his duty if anything went wrong with the warps to report the matter to the foreman, undertook to tighten the warp himself, and while so doing injured his finger, did not suffer accident by injury arising out of the employment. *McCabe v. North* [1913] W. C. & Ins. Rep. (Eng.) 522, 109 L. T. N. S. 369, 6 B. W. C. C. 504.

Where a lad had no duties to perform within the fencing of machinery while the machinery is in motion, but for some unknown reason went within the fence while the machinery was in motion, and was killed, the accident did not arise out of the employment. *Smith v. Stanton Ironworks Co. Collieries* [1913] W. C. & Ins. Rep. (Eng.) 186, 6 B. W. C. C. 239.

An employee who is injured while attempting to use machinery to stack sacks of flour, which he was employed to stack by hand, is not injured by accident arising out of and in the course of his employment. *Plumb v. Cobden Flour Mills Co.* [1914] A. C. (Eng.) 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, [1913] W. N. 367, [1914] W. C. & Ins. Rep. 49, 51 Scot. L. R. 861, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495, affirming [1913] W. C. & Ins. Rep. (Eng.) 209, 108 L. T. N. S. 161, 29 Times L. R. 232, 57 Sol. Jo. 264, 6 B. W. C. C. 245.

Where a boy employed in a soap factory goes outside of the sphere of his employment to an obviously dangerous place near machinery, and is injured, such injury does not arise out of and in the course of the employment. *Davies v. Crown Perfumery Co.* [1913] W. C. & Ins. Rep. (Eng.) 484, 6 B. W. C. C. 649.

An injury received while the applicant was working or meddling with a machine with which he had no work to perform was not from accident arising "out of and in the course of" the employment. *Cronin v. Silver* (1911) 4 B. W. C. C. (Eng.) 221.

If it was no part of the applicant's duty to start an engine, she was not entitled to compensation for injuries received while attempting to start it. *Losh v. Evans* L.R.A.1916A.

(1903) 51 Week. Rep. (Eng.) 243, 19 Times L. R. 142.

<sup>98</sup> Viscount Haldane, L. C., in *Plumb v. Cobden Flour Mills Co.* (Eng.) supra, quoting from his own prior decision in *Kerr v. Baird* [1911] S. C. 701, 48 Scot. L. R. 646, 4 B. W. C. C. 397, where a miner fired a shot in violation of the rules of the mine.

<sup>99</sup> A boy employed in a boot factory, who was directed to take an insole down stairs to have it remolded, and in the absence of the operator of the molding machine attempted to remold it himself, and was injured, is entitled to compensation where he had not been expressly forbidden to touch the molding machine. *Tobin v. Hearn* [1910] 2 I. R. 639, 44 Ir. Law Times, 197.

A workman injured while cleaning a part of the machinery that it was not his duty to clean, suffered an accident by injury arising out of and in the course of the employment, where he was not expressly forbidden to clean it. *Greer v. Thompson* [1912] W. C. Rep. 272, 46 Ir. Law Times, 89, 5 B. W. C. C. 586. The employer's agent admitted that the act, "was done for the benefit of all concerned."

<sup>1</sup> As where a workman ignored warnings and attempted to climb onto a moving traction engine. *McKeown v. McMurray* (1911) 45 Ir. Law Times, 190.

A messenger who had been provided by his employers with money to pay his fare, and was injured while attempting to board a tram-car moving at the rate of 5 miles an hour, without invitation and contrary to the notice on the car, was not injured by accident arising out of and in the course of his employment. *Symon v. Wemyss Coal Co.* [1912] S. C. 1239, 49 Scot. L. R. 921, 6 B. W. C. C. 298.

An injury to a workman received in attempting to jump off a train before it had stopped did not arise out of the employment, and he is not entitled to compensation. *Price v. Tredegar Iron & Coal Co.* [1914] W. N. (Eng.) 257, 30 Times L. R. 583, 58 Sol. Jo. 632, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 295, 111 L. T. N. S. 688, 7 B. W. C. C. 387.

A workman required to travel by train is outside of the scope of his employment in attempting to mount the train while in motion, although it was necessary for him to take that particular train in order to keep an appointment made for him by his employers. *Jibb v. Chadwick* [1915] 2 K. B. (Eng.) 94, 31 Times L. R. 185, [1915] W. N. 52, 8 B. W. C. C. 152, Lord Cozens-Hardy, M. R., and Swinfen Eady, L. J., pointed out that if it was his duty to take that train in order to keep his appointment with his employers, it was also his duty to



ably prevail in the case of train employees, and recovery has been allowed in some cases of this character.<sup>2</sup>

A servant does not necessarily cease to be in the course of his employment because he takes a wrong or dangerous method of doing what might be done safely.<sup>3</sup> So an injury to a window cleaner in falling off a ledge which connected two windows, along which he at-

tempted to climb from one window to the other, instead of going through the room into which the windows opened, arises out of the employment.<sup>4</sup> A recovery was also sustained in another case in which the general situation was similar.<sup>5</sup>

But where the workman's act subjects him to a known and imminent risk to which ordinarily he is not subjected, an

be at the station in time to take such train in a proper manner; and it was also pointed out that there was nothing in the evidence to show that his employment had prevented him from being at the station in proper time.

<sup>2</sup> As where a brakeman fell while trying to climb from a wagon to a brakesvan, with a view to using the steps on the van to descend to the ground, while the train was slowly passing a set of points. *Evans v. Astley* [1911] A. C. (Eng.) 674, 80 L. J. K. B. N. S. 1177, 105 L. T. N. S. 385, 27 Times L. R. 557, 4 B. W. C. C. 319.

A railroad porter who jumped on a passing van so as to be ready to remove luggage as quickly as possible, as was his duty, was not acting outside of his employment, although jumping on trains by porters had been strictly prohibited, and he had also been warned against the practice. *M'William v. Great North of Scotland R. Co.* [1914] S. C. 453, [1914] 1 Scot. L. T. 294, 51 Scot. L. R. 414, 7 B. W. C. C. 875. Lord Dundas said: "The indiscretion of this lad in jumping on the footboard—prompted apparently by overzeal 'in order to be ready to remove the luggage as quickly as possible when the train stopped'—could not, I think, be held to amount to departure from his proper sphere of service. He was performing his duty in an indiscreet and wrong manner, but still he was performing it."

<sup>3</sup> *Durham v. Brown Bros.* (1898) 1 Se. Sess. Cas. 5th series, 279, 36 Scot. L. R. 190, 6 Scot. L. T. 239, per Lord McLaren.

A workman who, while doing an act which is part of his duty, meets with an accident to which he is more exposed than persons not so engaged, is—or in case of death his dependents are—entitled to compensation from the employer, although the act is done negligently or contrary to rule. *Williams v. Llandudno Coaching & Carriage Co.* [1915] 2 K. B. (Eng.) 101, 84 L. J. K. B. N. S. 655, [1915] W. C. & Ins. Rep. 91, [1915] W. N. 52, 31 Times L. R. 186, 59 Sol. Jo. 286, 8 B. W. C. C. 143.

A fatal accident to a workman will be deemed to have occurred in the course of his employment, notwithstanding that at the time when it occurred he was going from one place of his employment to another by a forbidden route, which was more dangerous than another route which was available to him. *McNicholas v. Dawson* [1899] 1 Q. B. (Eng.) 773, 68 L. J. Q. B. N. S. 470, 47 Week. Rep. 500. The court of appeal reversed the county court judge L.R.A.1916A.

on the ground that his holding came to this, "that if a workman went by the wrong way from one point of his employment to another, an injury happening to him while doing so would not arise out of and in the course of the employment."

A workman on a vessel suffered injury by accident arising out of and in the course of his employment, where, when he came on deck to go to his breakfast, he found that the vessel was a little way from the quay side and the gangway removed, and he attempted to slip down a rope to the quay as other workman had done, but was injured in the attempt. *Keyser v. Burdick* (1910) 4 B. W. C. C. (Eng.) 87.

A seaman engaged in unloading fish from a trawler by means of an inclined board, who, while standing on the board, as it was his duty to do, was told to get off so that the slant of the board might be increased, and, instead of going on to the pontoon, upon which the fish were being placed, swung himself on to the stem of another trawler alongside, and in some unexplained manner fell into the water, and died as a result, suffered an accident arising out of and in the course of his employment. *Gallant v. The Gabir* [1913] W. C. & Ins. Rep. (Eng.) 116, 108 L. T. N. S. 50, 29 Times L. R. 198, 57 Sol. Jo. 225, 12 Asp. Mar. L. Cas. 284, 6 B. W. C. C. 9. *Cozens-Hardy, M. R.*, said that he met the accident while he was doing that which it was his duty and which he was employed to do, although perhaps he may have done it recklessly. *Buckley, L. J.*, said: "It seems to me the dependent has established, as of course she must establish, a *prima facie* case that this was in the course of the employment, and that the risk was one incidental to the employment, and that being so, the employers have not discharged the onus resting upon them by saying that it was not so because the man was larking about, or had left the sphere of his employment and had gone in for gymnastics. There is nothing to show that."

<sup>4</sup> *Bullworthy v. Glanfield* (1914) 7 B. W. C. C. (Eng.) 191.

<sup>5</sup> Where a farm bailiff in the course of his duties endeavored to reach through a window on a sill of which he stood, for a key within a building, instead of going a short distance of about three minutes' walk, where he could have procured a key to the door, the accident was held to arise out of and in the course of the deceased's employment, and the mere fact that he endeavored to discharge his duty by taking a short cut

injury resulting therefrom will be held not to arise "out of" the employment.<sup>6</sup> This principle is particularly applicable where the workman walks along a railway line when it is not necessary.<sup>7</sup>

The fact that the way by which the

workman leaves his place of work is dangerous does not deprive him or his dependents of compensation, if no other way is provided or possible.<sup>8</sup> Where a workman in a mine loses his way, and proceeds along a dangerous road, and is

did not deprive his dependents of the right to compensation. *Pepper v. Sayer* [1914] 3 K. B. (Eng.) 994, 30 Times L. R. 621, [1914] W. C. & Ins. Rep. 423, 83 L. J. K. B. N. S. 1756, 111 L. T. N. S. 708, 58 Sol. Jo. 669, [1914] W. N. 291, 7 B. W. C. C. 616.

<sup>6</sup> The finding of the sheriff substitute that the accident did not arise "out of and in the course of" the employment will be sustained where the evidence shows that the deceased, a miner, in making his way out of the pit neglected the proper and recognized road, and took a way which was not a made path, but which had been used occasionally by a number of the workmen. *Hendry v. United Collieries* [1910] S. C. 709, 47 Scot. L. R. 635, 3 B. W. C. C. 567. Lord Dunedin said: "Where there is a perfectly proper and recognized road out of premises, it is impossible to say that a man is in the course of his employment if he neglects that road and goes by some other means of exit which in point of fact is really no road at all."

A workman employed by a farmer who owned land on either side of a river was not in the course of his employment in attempting to swim across the river, instead of going some distance to a bridge by which the river could have been crossed in safety. *Guilfoyle v. Fennessy* [1913] W. C. & Ins. Rep. 228, 47 Ir. Law Times, 19, 6 B. W. C. C. 453.

A workman employed in scaling boilers on a ship did not suffer injury by accident arising out of the employment, where the injury was received when he was passing through a dangerous area which had been roped off, and through which it was not necessary for him to go in reaching the ship. *Murray v. Allen Bros.* [1913] W. C. & Ins. Rep. (Eng.) 193, 6 B. W. C. C. 215.

The act of a laborer engaged in work on a vessel in passing the gangway, and going further than he was required to do in order to go on board by the proper means provided, and in trying to jump on board, which he had been told not to do, is not in the course of his employment. *Martin v. Fullerton & Co.* [1908] S. C. 1030, 45 Scot. L. R. 812, 1 B. W. C. C. 168.

Compensation is not recoverable for injuries received when a workman's foot was pierced by a spike on top of a railing, which he undertook to scale in order to enter a church through a window, which he was endeavoring to enter to begin his work. *Gibson v. Wilson* (1901) 3 Sc. Sess. Cas. 5th series, 661, 36 Scot. L. R. 450, 8 Scot. L. T. 497.

<sup>7</sup> Where a workman in the employ of a railroad took a short cut along the railway line, instead of going around by the road, and was injured, no compensation is L.R.A.1916A.

recoverable. *M'Laren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492. The Lord President said: "I think a man who, instead of walking along the public road, which is the natural way to go, chooses to take a short cut for himself along a railway line, where the path is so near to the rails that he is liable to be knocked down by a passing engine, does increase the risks, and that if something happens to him in that position the accident is not one which arises out of his employment."

Where a workman employed at a coal mine, proposing to go home by crossing a railway siding on the premises of the mine owners, and by trespassing along a railway, was injured while crossing the siding, and there were two exits provided for leaving the mine, neither of which crossed the siding, the accident did not arise "out of and in the course of the employment" of the workman. *Haley v. United Collieries* (1906-7) S. C. (Scot.) 214.

A workman who, upon being required to cross railway metals, crossed at a point where there was boarding for crossing luggage, instead of taking a foot bridge, as passengers were required to do, subjected himself to additional risk, and the employer is not liable for injuries received by the workman while so crossing the metal, notwithstanding a large number of passengers did cross at the luggage crossing. *Pritchard v. Torkington* [1914] 58 Sol. Jo. (Eng.) 739, 7 B. W. C. C. 719.

A carter who left his horse and cart at a station and went up on an embankment and along a railway line where he had no duty whatsoever, and was struck by a train, and knocked down and killed, did not suffer injury by accident arising out of and in the course of his employment. *Morris v. Rowbotham* (1915) 8 B. W. C. C. (Eng.) 157.

<sup>8</sup> A workman engaged in loading a vessel, who, after his day's work is done and he is leaving the vessel by means of a ladder on which one end of a plank is resting, the other resting on the vessel, slips and falls from the ladder, suffers an injury by accident arising out of and in the course of his employment. *Webber v. Wansbrough Paper Co.* (1914; H. L.) 137 L. T. Jo. (Eng.) 237, [1914] W. N. 290, 111 L. T. N. S. 658, 30 Times L. R. 615, 58 Sol. Jo. 685, 7 B. W. C. C. 795, reversing the court of appeal [1913] 3 K. B. (Eng.) 615, 82 L. J. K. B. N. S. 1058, 109 L. T. N. S. 129, 29 Times L. R. 704, [1913] W. N. 236, 6 B. W. C. C. 583.

Where a deceased workman lived on one side of a river, and his employer on the other, and the only means of crossing the



injured, such injury has been held to arise out of the employment.<sup>9</sup>

If the act which caused the injury was within the scope of the servant's employment, the mere fact that he had been expressly forbidden to do that act will not necessarily be fatal to his claim. There have been great difficulty and much conflict of opinion in applying this principle. Frequently the disobedience to a command amounts to "serious and wilful misconduct," but under § 1, subs. 3, that factor is disregarded where the injury "results in death or serious and permanent disablement," and in any event does not affect the question here involved, namely, whether the injury arose out of and in the course of the employment.<sup>10</sup>

river was by use of a boat, and the workman fell out of the boat and was drowned as he was crossing in the usual manner, his death was caused by accident arising out of and in the course of the employment. *Nole v. Wadworth* [1913] W. C. & Ins. Rep. (Eng.) 160, 6 B. W. C. C. 129.

A farm laborer employed on an island off the mainland, who was permitted by his employer to go to his home on the mainland every Saturday night and return Monday morning, and who was injured while crossing to the island in a boat, as was customarily done, suffered an injury by accident within the meaning of the statute. *Richards v. Morris*, [1915] 1 K. B. (Eng.) 221, 84 L. J. K. B. N. S. 621, 110 L. T. N. S. 496, [1914] W. C. & Ins. Rep. 116, 7 B. W. C. C. 130.

An arbitrator is not precluded from finding that an accident arose out of and in the course of the employment because the workman when injured was leaving the premises by a route other than the customary one, where there was no express order forbidding the use of such route, and other employees customarily used it. *M'Kee v. Great Northern R. Co.* (1908) 42 Ir. Law Times, 132, 1 B. W. C. C. 165.

<sup>9</sup> Where a miner, in descending, left the cage by mistake before it reached the level at which he was working, and, on finding that the cage had resumed its descent, went down to the next level, and for some unexplained reason proceeded 600 or 700 feet along a road leading in the opposite direction from the road leading to his work, and there met his death by scalding from the exhaust steam from a pump. *Sneddon v. Greenfield Coal & Brick Co.* [1909-10] S. C. 362, 47 Scot. L. R. 337, 3 B. W. C. C. 557 (unavoidable inference was that he had lost his way, and blundered into the place where he was injured).

<sup>10</sup> "We have the difficulty of finding out a line between something that takes the accident entirely out of the employment, and something which within the employment is a serious and wilful misconduct which leads to accident." *Fletcher Moulton* 1916A

The essential point to be determined is whether the servant was actually doing the work he was employed to do, or whether he was doing something substantially different. In the former case, numerous decisions support the view that mere disobedience to orders does not take him outside the statute. In a leading case taking this view, a workman whose duty it was to oil machinery was killed while attempting, contrary to orders, to oil it while it was in motion.<sup>11</sup> In such a case it is plain that the workman was actually doing the work which he was employed to do. In another case a boy sat down to do his work, contrary to express orders.<sup>12</sup> In yet another case, a workman forbidden to touch machinery attempted to replace the belt, which it

ton, L. R., in *Watkins v. Guest* (1912) 5 B. W. C. C. (Eng.) 307.

<sup>11</sup> *Mawdsley v. West Leigh Colliery Co.* (1911) 5 B. W. C. C. (Eng.) 80.

<sup>12</sup> A boy engaged in rolling ventilator tires, who knew that it was forbidden to sit down while engaged in the work, was nevertheless not out of his employment in sitting down to his work, and is entitled to compensation for injuries received while so sitting, although the accident could not have happened if he had been standing instead of sitting. *Chilton v. Blair* (1914) 30 Times L. R. (Eng.) 623, 58 Sol. Jo. 669, 7 B. W. C. C. 607, affirmed by the House of Lords in (1915), 31 Times L. R. (Eng.) 437, [1915] W. N. 203, 8 B. W. C. C. 1. In the court of appeal, *Cozens-Hardy, M. R.*, said: "It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do, though doing it negligently and contrary to rules laid down. On the other hand, a workman cannot recover compensation if he was not doing the work he was employed to do, but was doing something substantially different, although intended to produce the same result. An instance of the first class is where a man's duty was to oil machinery, and he was told not to do it when the machinery was in motion. He did it while the machinery was in motion. The employer was held liable, although there was serious and wilful misconduct. An instance of the second class is found in the recent case of the House of Lords of *Plumb v. Cobden Flour Mills Co.* [1914] A. C. (Eng.) 62, 83 L. J. K. B. N. S. 197 [1914] W. C. & Ins. Rep. 48, 109 L. T. N. S. 759, [1913] W. N. 367, 51 Scot. L. R. 861, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495, where a man whose duty it was to pile up sacks by hand, took upon himself to rig up some machinery to lift them. It was held, affirming this court, that he had taken himself out of his employment." *Swinfen-Eady, L. J.*, said: "In one sense the injury

was necessary for him to do in order to do his own work.<sup>13</sup> In the note below there will be found numerous other cases applying the principle that mere dis-

was caused by an added peril which the boy took upon himself, a peril which his contract of service did not oblige him to encounter; but, on the other hand, the added peril did not take the boy away from the very work he was engaged to perform; it added danger to the performance of that work." Pickford, L. J., said that the boy "was actually turning the wheel which it was his duty to turn, at the moment when the accident happened, but he was doing it while sitting down, which was forbidden, instead of standing up, as was his duty, with the result of making an ordinary incident of his work a danger to him which it would not otherwise have been," and that this was "doing his work in a wrong way, but not doing something outside the sphere of his employment."

<sup>13</sup> Recovery has been allowed where a carpenter, part of whose duty was to sharpen his tools on a grindstone rotated by machinery, had been forbidden to touch the machinery, and was injured while endeavoring to replace the belt, which started the grindstone after it had slipped. *Whitehead v. Reader* [1901] 2 K. B. (Eng.) 48, 84 L. T. N. S. 514, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 17 Times L. R. 387, 3 W. C. C. 40, *Romer, L. J.*, said: "I am not able to gather from the facts of the case that the replacing of the band was an act on the workman's part so remote from his ordinary duties that it could not be fairly said to be one arising out of and in the course of his employment. It is not the case of a workman whose duties in no way bring him into contact with his master's machinery, officiously or for his own purposes meddling with that machinery contrary to orders, and so being injured."

<sup>14</sup> Recovery has been allowed where a workman employed to inspect scrap iron consigned to his employers at various railroad stations, was in the course of his duty, returning from such an inspection to the warehouse, and attempted to cross, contrary to rules, the lines of the railroad while shunting operations were in progress, and was killed. *Sanderson v. Wright* (1914) 110 L. T. N. S. (Eng.) 517, 30 Times L. R. 279, [1914] W. C. & Ins. Rep. 177, 7 B. W. C. C. 141.

And where a workman employed by the defendants to attend to a steam engine within a shed, and to a mortar pan outside the shed, worked by the steam engine and used to grind mortar for a building, was caught in a revolving shaft, as a result of his entering the shed by a door which he had been forbidden to use. *McNicholas v. Dawson* [1899] 1 Q. B. (Eng.) 773, 68 L. J. Q. B. N. S. 470, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242.

And where a collier leaving a mine induced a boy by a truck to wind him up by a shaft which was used only for pulling L.R.A.1916A.

obedience to rules does not take the workman outside the provision of the act.<sup>14</sup> Of course if the forbidden act is done in an honest attempt to further

up tools, and by which the men were prohibited to ascend, the boy being so startled when the collier reached the top that he let go. *Douglas v. United Mineral Min. Co.* (1900) 2 W. C. C. (Eng.) 15.

And where the second engineer lit a fire in his cabin during the night in violation of orders, but it was found that as matter of fact some fire was necessary owing to the intense cold. *Edmunds v. The Peterston* (1911) 28 Times L. R. (Eng.) 18.

A collier did not go outside of his employment merely because he went from a place where he had been directed to work to another place about three yards distant where he was injured, although he had been warned not to work at the latter place because it was dangerous. *Jackson v. Denton Colliery Co.* [1914] W. C. & Ins. Rep. (Eng.) 94, 110 L. T. N. S. 559, 7 B. W. C. C. 92.

The fact that a miner goes into a forbidden area to get a pick needed by him in his work does not take him out of his employment. *Conway v. Pumpherson Oil Co.* [1911] S. C. 660, 48 Scot. L. R. 632, 4 B. W. C. C. 392.

It may be found that an injury by accident to a groom who was thrown from a horse arose "out of and in the course of" his employment, although there was evidence that he had been told to lead, and not to ride, the horse. *Wright v. Scott* (1912) 5 B. W. C. C. (Eng.) 431.

The engineer of a trawler who was injured when it was blown up by a mine laid by an enemy is entitled to compensation, although the shipper had taken the wrong course and entered an area against which he had been warned, where at the time of the explosion he was on his way to warn war vessels of the mines. *Risdale v. The Kilmarnock* [1915] 1 K. B. (Eng.) 503, 84 L. J. K. B. N. S. 298, [1915] W. C. & Ins. Rep. 141, 112 L. T. N. S. 439, 31 Times L. R. 134, 59 Sol. Jo. 143, 8 B. W. C. C. 7.

A pikeman in a mine, whose duty it was to light the fuses, was not acting outside the scope of his employment in firing charges at a particular time, although he had been told by the fireman in charge to await further instructions before firing them. *Corbett v. Pitt* (1915) 8 B. W. C. C. (Eng.) 466.

A workman is not necessarily acting outside of the scope of his employment while he is acting contrary to a rule, where such rule is habitually violated. *McGuire v. Gabbott* (1915) 8 B. W. C. C. (Eng.) 555.

A collier riding to his work on a train furnished by the employer, who, as it approached the station, got out on the foot-board contrary to orders, and was pushed off, was injured by accident arising out of and in the course of his employment. *Watkins v. Guest* [1912] W. C. Rep. (Eng.) 150, 106 L. T. N. S. 818, 5 B. W. C. C. 307. *Cozens-Hardy, M. R.*, in distinguish-



the master's business, the case affords a better opportunity for the application of the principle stated above.<sup>15</sup>

Where, however, the prohibited act is one lying wholly outside of the sphere

of his employment, no recovery is allowable;<sup>16</sup> as, where the workman goes into a place where he has been forbidden to go and where his duties do not call him,<sup>17</sup> or where he is, contrary to orders,

ing the Barnes Case (Eng.) (see note 18, *infra*) said that it really was not quite the same as though the collier had ridden all the way on the footboard. This decision seems to be very near the line. Buckley, L. J., dissenting, said: "It seems to me that this man, who was rightly traveling by train, was adding by his own conduct an additional peril by getting out of the carriage and placing himself on the footboard, ready to alight, and then in some way,—we do not know how,—in that state of things, he slipped and fell and his hands were cut off by the moving train. That was a risk which did not in any way, to my mind, arise out of his employment; it arose from the fact that he, rightly traveling by train for the purpose of his employment, took a step which added a peril which had nothing to do with his employment at all, which he need not have faced for any purpose of his employment. I think, under these circumstances, the accident did not arise out of his employment, but arose out of his own conduct in doing something which was not wanted for the purpose of his employment, and was not done for the purpose of his employment, but which was a peril which he voluntarily added."

Where a miner was injured by the explosion of a shot by a shot firer after the miner had coupled the charge to the cable in direct violation of orders, and before he could get to a place of safety, it was held that his injury did not arise out of and in the course of his employment. *Smith v. Fife Coal Co.* [1913] S. C. 663, [1913] W. C. & Ins. Rep. 343, 50 Scot. L. R. 455, 6 B. W. C. C. 435. It is difficult to find reasonable support for this decision. The miner had completed the connection, and it would seem that the only cause of the accident was the firing of the shot by the shot firer before the miner could get to a place of safety. It certainly could be strenuously argued, were the action at common law, that the accident was the result of the shot firer's act, and not of the contributory negligence of the miner in violating the orders, and this seems to be the view of Lord Dundas, for in writing the opinion he says: "He [the arbitrator] seems to me to have approached the matter from a wrong standpoint, and to have decided it having regard to the common-law rules of liability and contributory negligence, which are, I think, wholly beside this question under the workmen's compensation act." This rule apparently places a greater burden upon the workman than he would have to bear under the common law, for an act of contributory negligence not sufficient to bar a recovery at common law is held to be outside of the employment, under the act. It is to be noted

that the House of Lords, in a decision rendered after the above criticism was written, held that the essential cause of the accident was not the unauthorized assumption of duty by the miner, but the premature firing of the shot, and that the arbitrator's finding that the miner was entitled to compensation should be upheld. [1914] A. C. (Eng.) 723, 83 L. J. P. C. N. S. 1359, 111 L. T. N. S. 477, [1914] S. C. 40, 51 Scot. L. R. 496, [1914] W. C. & Ins. Rep. 235, 30 Times L. R. 502, 58 Sol. Jo. 533, [1914] W. N. 196, 7 B. W. C. C. 253).

<sup>15</sup> Although a collier in going into a dangerous working in disobedience to the colliery special rules, and against the warnings of a fireman or overlooker, was guilty of "serious and wilful" misconduct, yet if he did so in an honest attempt to further that which he was instructed to effect, his dependents may secure compensation for his death, which resulted from such act. *Harding v. Brynadam Colliery Co.* [1911] 2 K. B. (Eng.) 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269.

See also *Whitehead v. Reader* (Eng.) cited in note 13, *supra*.

<sup>16</sup> In *Kerr v. Baird* [1911] S. C. 701, 48 Scot. L. R. 646, 4 B. W. C. C. 397, where a miner attempted to fire a shot in a mine, which it was not his duty to fire, the Lord President said: "I think it is quite clear that in this case the accident did not occur whilst the injured man was performing his ordinary work, but whilst he was arrogating to himself duties which he was neither engaged nor entitled to perform."

In *Barnes v. Nunnery Colliery Co.* [1912] A. C. (Eng.) 44, 5 B. W. C. C. 195, Lord Atkinson said: "In these cases under the workmen's compensation act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in the other case."

<sup>17</sup> No recovery is allowable where a girl engaged in passing sheaves undertook, in disobedience to an express prohibition, to step across the opening through which they were fed, merely for the purpose of speaking to a friend, and without any necessity arising out of the work. *Callaghan v. Maxwell* (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Scot. L. R. 313, 7 Scot. L. T. 339.

Where a brakeman was injured by jumping off the seat of a lorry, where he had been expressly forbidden to go, and where

riding in a forbidden conveyance,<sup>18</sup> or where, contrary to orders, he attempts

to do work around machinery with which his duties have no connection.<sup>19</sup>

he had no duty to perform. *Revie v. Cumming* [1911] S. C. 1032, 48 Scot. L. R. 831.

Where a workman climbed onto a tank to eat his dinner, contrary to orders. *Brice v. Lloyd* [1909] 2 K. B. (Eng.) 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744.

Where a miner's body was found among the debris after a shot had been fired in a place where he had been forbidden to go, and no reason was shown for his being there. *Traynor v. Addie* (1911) 48 Scot. L. R. 820, 4 B. W. C. C. 357.

Where a workman engaged to dig flints goes, contrary to orders, into a deep trench. *Parker v. Hambrook* [1912] W. N. (Eng.) 205, 107 L. T. N. S. 249, 56 Sol. Jo. 750, [1912] W. C. Rep. 369, 5 B. W. C. C. 608, Ann. Cas. 1913C, 1.

Where a miner was killed at a place in the mine where he had been positively forbidden to go. *Tomlinson v. Garratts* [1913] W. C. & Ins. Rep. (Eng.) 416, 6 B. W. C. C. 489.

Where a messenger boy employed at a goods station attempted to cross the track at night for his own purposes and contrary to orders, and was struck and killed by a passing engine. *McGrath v. London & N. W. R. Co.* [1913] W. C. & Ins. Rep. (Eng.) 198, 6 B. W. C. C. 251.

An accident caused by a workman going into place where he has been forbidden to go does not "arise out of" the employment. *Powell v. Lanarkshire Steel Co.* (1904) 6 Sc. Sess. Cas. 5th series (Scot.) 1039.

A miner who, after he had been suspended, was directed to go to a certain part of the mine, is not entitled to compensation for injuries while remaining in the place which he had been told to leave. *Smith v. South Normanton Colliery Co.* [1903] 1 K. B. (Eng.) 204, 72 L. J. K. B. N. S. 76, 67 J. P. 381, 51 Week. Rep. 209, 88 L. T. N. S. 5, 19 Times L. R. 128.

A cook on a trawler was not acting within the course of his employment in returning to the trawler at 11 o'clock at night, where the undisputed evidence was that he had been forbidden to sleep on the trawler at night. *Griggs v. The Gamecock* [1913] W. C. & Ins. Rep. (Eng.) 122, 6 B. W. C. C. 15.

<sup>18</sup> As where a boy at work in a colliery in disobedience to orders got in a tub that was being hauled on an endless chain. *Barnes v. Nunnery Colliery Co.* [1910] W. N. (Eng.) 248, 45 L. J. N. C. 757, affirmed in [1912] A. C. (Eng.) 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, [1912] W. C. Rep. 90, [1911] W. N. 251, 5 B. W. C. C. 195, *Earl Loreburn, L. C.*, said: "You cannot say that this boy was employed to be prudent and cautious, and therefore deny him compensation if, by reason of his want of prudence and caution, he meets with an accidental injury. Nor can you deny L.R.A.1916A.

him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment."

Where a miner is injured while he is riding on a tub in violation of orders. *Bates v. Mirfield Coal Co.* [1913] W. C. & Ins. Rep. (Eng.) 180, 6 B. W. C. C. 165.

Where a brusher in a mine, in violation of a known rule, jumper in a hutch that was being taken to the bottom of the mine. *Kane v. Merry* [1911] S. C. 533, 48 Scot. L. R. 430, 4 B. W. C. C. 379.

Where a collier who, in going from one part of the mine to another, rode, contrary to orders, on the coupling between two trams, and was injured while so riding. *Powell v. Bryndu Colliery Co.* (1911) 5 B. W. C. C. (Eng.) 124.

Where a workman tried to get on a moving train contrary to orders merely to get a lift home. *Pope v. Hill's Plymouth Co.* (1910) 102 L. T. N. S. (Eng.) 632, 3 B. W. C. C. 339, affirmed in [1912; H. L.] 105 L. T. N. S. (Eng.) 675, [1912] W. C. Rep. 15, 5 B. W. C. C. 175.

A boy employed as a shunter on a private line of railway connected with some private works, whose duty it was to keep a lookout by walking in front of the wagons as they were being shunted or moved, and who was injured while riding on the wagon, which he was forbidden to do, exposed himself to a new and added peril not incident to his employment and is not entitled to compensation. *Herbert v. Fox* [1915] 2 K. B. (Eng.) 81, 84 L. J. K. B. N. S. 670, [1914] W. C. & Ins. Rep. 154, [1914] W. N. 44, 59 Sol. Jo. 249, 8 B. W. C. C. 94.

A message boy who, in using a hoist to carry him to the third floor of a building where it was his duty to go, instead of walking up the stairs, knowingly violates his orders, is outside the course of his employment. *McDaid v. Steel* [1911] S. C. 859, 48 Scot. L. R. 765, 4 B. W. C. C. 412.

A collier may be found to have been injured by accident arising out of and in the course of his employment, where he received the injury by riding on a tub, although such an act was forbidden, but there was no evidence that the colliers knew of the prohibition, and the fireman whose duty it was to enforce the rules permitted the men to ride on the tub when they could. *Richardson v. Denton Colliery Co.* [1913] W. N. (Eng.) 238, [1913] W. C. & Ins. Rep. 554, 109 L. T. N. S. 370, 6 B. W. C. C. 629.

<sup>19</sup> Where a person employed in a factory to do purely unskilled labor, and expressly forbidden to touch any of the machinery,



A servant does not cease to be in the course of his employment, merely because he is not actually engaged in doing what is specially prescribed to him, if, in the course of his employment, an emergency arises, and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master.<sup>20</sup> In several de-

cisions it has been held that a workman injured while attempting to rescue another workman who is in danger is entitled to compensation, where the danger to which the other workman is subjected is incurred in the course of the employment.<sup>21</sup> But the rule is otherwise where the dangerous situation does not arise out of and in the course of the employment. As, where an employee, goes to

was injured while attempting, in violation of such orders, to clean a machine. *Lowe v. Pearson* [1899] 1 Q. B. (Eng.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124.

Where a boy employed to piece broken ends of yarn is injured while cleaning machinery, which he had been forbidden to do. *Naylor v. Musgrave Spinning Co.* (1911) 4 B. W. C. C. (Eng.) 286.

Where a driver of a canal boat violated the orders of his employer, and attempted to steer the boat, and was drowned while steering. *Whelan v. Moore* (1909) 43 Ir. Law Times, 205 (the desertion of another boatman created no emergency justifying the disobedience).

Where a baker in a steam bakery was killed while starting an engine which he had been forbidden to start. *Marriott v. Brett* (1911) 5 B. W. C. C. (Eng.) 145.

Where a workman who, after being warned not to touch a switchboard, deliberately does so, and is injured. *Jenkinson v. Harrison* (1911) 4 B. W. C. C. (Eng.) 194.

Where a liftman who was forbidden to oil the lift was injured while attempting to oil it. *Dougal v. Westbrook* [1913] W. C. & Ins. Rep. (Eng.) 522, 6 B. W. C. C. 705.

A miner who attempts to convey wood in a mine by means of a wheel brae which he had been forbidden to use, and is fatally injured, does not suffer injury by accident arising out of his employment, if he thereby exposes himself to a risk which his ordinary employment does not call on him to face. *Burns v. Summerlee Iron Co.* [1913] S. C. 227, 50 Scot. L. R. 164, [1913] W. C. & Ins. Rep. 45, 6 B. W. C. C. 320.

An accident to a boy while he is playing with certain pinion wheels which he has been forbidden to touch does not arise "out of and in the course of" his employment. *Furniss v. Gartside* (1909) 3 B. W. C. C. (Eng.) 411.

A workman who, contrary to orders, attempts to clean machinery while it is in motion, and is injured, does not suffer injury by accident arising out of his employment. *McDiarmid v. Ogilvy Bros.* [1913] W. C. & Ins. Rep. 537, 50 Scot. L. R. 883, 6 B. W. C. C. 878. The Lord President said that the mere disregard of the prohibition would not prevent a recovery, but what distinguished this case from the *Mawdsley Case* (note 11, supra) was the fact that there were certain prescribed times for cleaning the machinery, L.R.A.1916A.

and the workman was trying to do it at some other time. He further said: "Now in this case the workman had no general employment to clean the machine, but a special employment to clean the machine for an hour early on the morning of Tuesday, and an hour early on the morning of Friday, when special preparations were made. What I wish to say is this, that the workman could be under no mistake as to whether he was doing his duty. He could not think he was doing the duty of a Tuesday or a Friday morning; he was doing something on another day which he knew was not his duty."

<sup>20</sup> *Durham v. Brown Bros.* (1898) 1 Sc. Sess. Cas. 5th series, 279, 36 Scot. L. R. 190, 6 Scot. L. T. 239.

Recovery was also allowed where a carter in the employment of a railway company was injured while he was endeavoring to stop a horse which had suddenly started off, from some unexplained cause, with the cart. *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

In *Rees v. Thomas* [1899] 1 Q. B. (Eng.) 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301, recovery was allowed where a fireman employed in a coal mine was, in the course of his duty, carrying a report of the state of the mine from the pit's mouth to the office, and the horse drawing the tramway truck in which he was riding ran away, and in endeavoring to stop it he fell and was killed. *Lowe v. Pearson* [1899] 1 Q. B. (Eng.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124, was distinguished on the ground that the act there which was done outside the scope of the servant's employment was not done in any emergency.

Where a workman employed by a lion tamer was left in charge of the cages of lions, and was injured while attempting to get a lion back into the cage, recovery was allowed upon the theory that, as he had been left in charge, he might properly attempt to drive the lion back. *Hapelman v. Poole* (1908) 25 Times L. R. (Eng.) 155, 2 B. W. C. C. 48.

<sup>21</sup> Fatal injuries to a workman while attempting to rescue a fellow workman who had fallen down a shaft which they were engaged in cleaning out arose out of and in the course of employment. *Matthews v. Bedworth Brick, Tile & Timber Co.* (1899;

the rescue of his employer, who is being attacked by a gang of rowdies, and is stabbed to death,<sup>22</sup> or where the dangerous situation was created by a workman indulging in horseplay.<sup>23</sup>

The mere fact that a workman was not actively engaged in his duties will not

deprive him of compensation.<sup>24</sup> Thus compensation will not be denied because at the time of the injury the workman was not actively engaged in his work, but was awaiting an opportunity to begin it.<sup>25</sup> So compensation is recoverable where a workman is injured while going

C. C.) 106 L. T. Jo. (Eng.) 485, 1 W. C. C. 124.

A laborer whose duties in unloading a vessel do not require him to go upon it does not go out of his employment in volunteering to go in the hold to rescue another laborer who has been overcome by gas. *London & E. Shipping Co. v. Brown* (1905) 7 Sc. Sess. Cas. 5th series, (Scot.) 488. The Lord Justice Clerk said: "I cannot doubt that, in a sudden emergency where there is danger, a workman does not go out of his employment if he endeavors to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that, if the man did his best to stop the horse, and met with an injury, he suffered that injury in the course of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and therefore in the interests of his master. The same would apply to the endeavor to sprag a runaway wagon, which might cause loss of life. No doubt this case is somewhat unusual, and the endeavor was made to liken it to the case of persons arriving on the scene of a disaster, such as a coal-pit explosion, and deliberately volunteering to join a rescue party, and who therefore could be held not to be acting as employees, but solely as individuals. I can conceive such a case, where it would be very difficult to make the act apply; but, in my view, any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him, engaged in work on the quay, come suddenly into danger, and he had instantly endeavored to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory."

An employee who suffered an apoplectic seizure was not outside of the protection of the statute merely because the seizure resulted from overexertion in running to the place of an accident and back again, to give notice by telephone of such accident. *Aitken v. Finlayson* [1914] S. C. 770, 2 Scot. L. T. 27, 51 Scot. L. R. 653, [1914] W. C. & Ins. Rep. 398, 7 B. W. C. C. 918.

<sup>22</sup> *Collins v. Collins* [1907] 2 I. R. (Ir.) 104.

<sup>23</sup> A workman is not injured by accident arising out of his employment, where the L.R.A.1916A.

injury is incurred in attempting to rescue a fellow workman who, while engaged in hauling a bogie across a public street, indulged in some horseplay and became in danger of injury by the bogie. *Mullen v. Stewart* [1908] S. C. (Scot.) 991, 1 B. W. C. C. 204. Lord Ardwall said: "M'Ginlay [the workman rescued] had improperly begun to play with a rope by means of which another squad of men were hauling a bogie from the north to the south side of the street, and he had fallen across the rope, so that at the time of the accident M'Ginlay had not returned to his own working place. He was not engaged on his master's work. On the contrary, he was impeding another squad of men in their work, and he was in no different position as regards the respondents than he would have been if he had been a stranger who had fallen in the street in front of a lorry or a tramway car. And it is obvious that in neither of these cases could it have been said of Mullen, if he had tried to rescue M'Ginlay, that the accident arose out of and in the course of his employment."

<sup>24</sup> "As Milton tells us, 'they also serve who only stand and wait.'" *Holmes, L. J., in Sheehy v. Great Southern & W. R. Co.* [1913] W. C. & Ins. Rep. 404, 47 Ir. Law Times, 161, 6 B. W. C. C. 927.

Recovery was allowed where an engineer was run down, when recrossing a track to reach his engine which he had left in order to ask a traffic regulator why he had been ordered to take it to a certain place. *Goodlet v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 986, 39 Scot. L. R. 759, 10 Scot. L. T. 203.

And where an engineer who, after being relieved of duty when his engine was on a siding, walked along the track to a station, where he had to report himself as being off duty. *Todd v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Scot. L. R. 784, 7 Scot. L. T. 85.

<sup>25</sup> An injury to a train guard who fell off a buffer stop at a station where he was obliged to wait about eight hours for the train upon which he was to serve as guard may be found to be caused by accident arising out of the employment. *Sheehy v. Great Southern & W. R. Co.* (Ir.) *supra*. The basis of the decision was that a workman who is obliged to wait at a place for a considerable length of time before his active duties begin must be allowed some freedom of choice as to the particular place in which he will spend such time.

A workman who was instructed to get a barge at a wharf, but, upon going there, found that he would not be able to get it for some time because of the condition



from one place of work to another by means of a conveyance furnished by the employer,<sup>26</sup> or while going from one place to another at the direction of his superior.<sup>27</sup>

An injury to a domestic servant who sleeps on the premises may arise "out of" the employment, although the injury is received while she is lying in her bed.<sup>28</sup> So too, the fact that the work-

man is on the premises for the sole purpose of securing his pay will not deprive him of the right to compensation.<sup>29</sup> And it has been held that the workman is not outside the scope of his employment, although he is on the premises for the sole purpose of procuring his belongings, where it is done with the employer's permission and on the employer's time.<sup>30</sup>

The procuring of food or other refresh-

of the tide, did not go outside of the ambit of his employment in attempting to get into a small boat near by, in which he could sit down and watch the tide until the time was favorable for him to perform his work. *May v. Ison* [1914] W. C. & Ins. Rep. (Eng.) 41, 110 L. T. N. S. 525, 7 B. W. C. C. 148.

It may be found that an injury was by accident arising "out of" the employment where the injury was received by a servant who was sitting near a fire warming himself, while he was waiting for the arrival of some trucks, the wheels of which it was his duty to oil. *Harrison v. Whittaker* (1899) 16 Times L. R. (Eng.) 108, 64 J. P. 54.

<sup>26</sup> An employee of an electric tramway company engaged in repairing the overhead wires is, while riding on a tower wagon from the place where repairs have been completed to another place where repairing is required, within the provisions of the act. *Rogers v. Cardiff Corp.* [1905] 2 K. B. (Eng.) 832, 75 L. J. K. B. N. S. 22, 54 Week. Rep. 35, 93 L. T. N. S. 683, 22 Times L. R. 9, 70 J. P. 9, 4 L. G. R. 1.

<sup>27</sup> *Jesson v. Bath* (1902; C. C.) 113 L. T. Jo. (Eng.) 206, 4 W. C. C. 9.

<sup>28</sup> A domestic servant who was injured by a piece of mortar falling from the ceiling of her room, as she was in the act of arising after being called by her mistress, is injured by accident arising out of and in the course of her employment. *Alderidge v. Merry* [1913] 2 I. R. 308, [1913] W. C. & Ins. Rep. 97, 47 Ir. Law Times, 5, 6 B. W. C. C. 450.

A kitchen maid in a hotel, who slept on the premises, and was suffocated while asleep in her sleeping room by smoke from a fire in the hotel, suffered death from accident arising out of and in the course of her employment. *Chitty v. Nelson* (1908; C. C.) 126 L. T. Jo. (Eng.) 172, 2 B. W. C. C. 496.

But where a workman lived in a house owned by his employers, and agreed to be responsible for certain cleaning operations in the house and other duties, and in return was to have the house rent and rates free, and was killed by gas escaping into his bedroom from a stove in the office, where it had been lighted by the night watchman, he did not suffer injury by accident arising out of or in the course of his employment. *Wray v. Taylor Bros.* [1913] W. C. & Ins. Rep. (Eng.) 446, 109 L. T. N. S. 120, 6 B. W. C. C. 530, 4 N. C. C. A. 935. The court found that the occu-

pancy of the cottage was merely a contract of tenancy in consideration of services to be given.

<sup>29</sup> An injury to a servant who, several hours after he had left off work on Saturday morning, went to the pay office, as he was required, to get his wages, was occasioned "in the course of his employment." *Lowry v. Sheffield Coal Co.* (1907) 24 Times L. R. (Eng.) 142.

In *Riley v. Holland* [1911] 1 K. B. (Eng.) 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155, where the applicant, who had been discharged from a mill, went to the mill two days afterwards upon the regular pay day to get her pay, and was injured by slipping on her way down the stairs from the pay office, it was held that the accident arose out of and in the course of her appointment. *Cozens-Hardy, M. R.*, referred to the observations of *Vaughan Williams, L. J.*, in *Holness v. Mackay* [1899] 2 Q. B. (Eng.) 319, where the latter said: "Though the employment is at an end in the sense that the workman (whether rightly or wrongly) has ceased to work under the contract, yet the employment may continue because of an obligation of the employer to the workman arising out of the course of the employment and continuing at the time of the occurrence of the accident."

An injury to a workman on the public roads engaged in building manholes, received while on his way back to his work from the tramway station where he was obliged to go for his pay, which injury was received as he was dismounting from a tram car which he had gotten on to be carried back to his work, but which, as he found, would not carry him to his place of work, is one caused by accident arising "out of and in the course of" his employment. *Nelson v. Belfast Corp.* (1908) 42 Ir. Law Times, 223, 1 B. W. C. C. 158.

But in *Lasturka v. Grand Trunk P. R. Co.* (1913) 7 B. W. C. C. (Alberta) 1031, the supreme court of Alberta held that a workman who, on the day following his leaving the employment, was injured while walking along the line of the railway to the section house, presumably for the purpose of receiving his pay, did not suffer injury by accident arising out of and in the course of the employment.

<sup>30</sup> In *Gonyea v. Canadian P. R. Co.* (1913) 7 B. W. C. C. (Sask.) 1041, the supreme court of Saskatchewan, affirming the decision of the lower court (7 B. W. C. C.

ment is recognized as essential to a workman, and he does not, as a matter of course, go outside of his employment where he leaves off active work to secure food or drink.<sup>31</sup> And the mere fact that the workman is paid by the hour does

not disentitle him to compensation for injuries received while engaged in eating his lunch.<sup>32</sup> But the lunch hour of a law writer is not a part of the time of his employment.<sup>33</sup>

The fact that a workman is engaged

1029), held that an injury to a workman employed by a railroad company arose out of and in the course of his employment, where he was injured while on the defendant's premises by their permission, during the time he was in their employment, for the purpose of procuring some clothes and bedding belonging to him, which were brought by one of the defendant's trains from his last place. After citing a number of cases decided by the English court or appeal, the court said: "The result of these cases would seem to be that if any workman, during the hours of his employment, with the permission of his employers, ceases working for a short time for purposes of his own, the continuity of his employment is not thereby impaired. By granting permission, the employer in effect says: 'Your time is mine, but I will give you the short period you require.' If, however, no permission is given, or the circumstances show that the time taken was not to be considered the employer's time, the workman ceases his employment, if he goes about his own business. In the case at bar, the plaintiff had, as I have found, permission to go for his clothes at the time he did go for them. His employer made him a gift of the necessary time. I am therefore of opinion that he was in the course of his employment."

<sup>31</sup> Compensation may be recovered where a workman feeling thirsty at his work goes for a drink of water to a place close at hand on his master's premises, and is injured before returning to his place of work. *Keenan v. Flemington Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409.

Where a workman employed to watch trawlers in a quay, whose duty required him occasionally to be on the quay, and whose watch continued for twenty-five hours, and who was to furnish his own food and drink, left his place of duty for a short time to get a drink, and while descending a fixed ladder attached to the quay for the purpose of going to a trawler fell into the water and was drowned. *Low v. General Steam Fishing Co.* [1909] A. C. (Eng.) 523, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 53 Sol. Jo. 763.

Where a workman who, in the course of his employment, was sitting on a wagon which was being drawn by a traction engine, fell from the wagon in an attempt to recover his pipe which he had dropped. *McLauchlan v. Anderson* [1911] S. C. (Scot.) 529. The Lord President said: "He had a right to be at the place, riding on or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual R.A.1916A.

al period of transit; and he was doing a thing which a man while working may reasonably do,—a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again."

A brewer's drayman engaged in delivering and obtaining orders for beer, whose hours were from 8 o'clock in the morning until 8 in the evening was not out of his employment in stopping the dray, crossing the street to a public inn to get a glass of beer, and returning within two minutes to his dray; and his dependents may recover compensation for his death by being struck by a motor car while he was returning to the dray. *Martin v. Lovibond* [1914] 2 K. B. (Eng.) 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 76, 7 B. W. C. C. 243. *Cozens-Hardy, M. R.*, said that his employment rendered him exceptionally exposed to street accidents.

An employee in respondent's warehouse, who with the knowledge of his employers goes to a cabin upon the railroad premises for tea, is not, while returning from the cabin, outside of his employment, and he is entitled to compensation for injuries received at that time. *Earnshaw v. Lancashire & Y. R. Co.* (1903; C. C.) 115 L. T. Jo. (Eng.) 89, 5 W. C. C. 28.

A girl employed on a threshing machine is not outside of her employment while partaking of some refreshment furnished by her employer, merely because of the fact that at the time she takes, for the sake of shelter, a position on the opposite side of the opening through which the sheaves pass into the machine, and is injured while arising from some sheaves on which she has been sitting. *Carinduff v. Gilmore* (1914) 48 Ir. Law Times, 137, [1914] W. C. & Ins. Rep. 247, 7 B. W. C. C. 981.

Injury to a night watchman, caused by the falling of a shanty into which he went to cook some food, as it was raining, may, in the absence of any prohibition against the use of the shanty, be considered as arising out of and in the course of his employment. *Morris v. Lambeth Borough Council* (1905) 22 Times L. R. (Eng.) 22.

<sup>32</sup> A servant who is paid by the hour for the number of hours which he actually works during the week is entitled to compensation for injuries received by a wall falling on him while eating his dinner. *Blovelt v. Sawyer* [1904] 1 K. B. (Eng.) 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105.

<sup>33</sup> *McKrell v. Howard* (1909) 2 B. W. C. C. (Eng.) 460.



by the hour or by the piece does not necessarily prevent recovery of compensation for injuries received while not actually engaged at his duties.<sup>34</sup>

In the absence of special circumstances the act does not apply to a workman in going to and from his work.<sup>35</sup> His employment begins, in the

ordinary course, only when the time for work has arrived and the locality has been reached at which the work is to be performed.<sup>36</sup> So, too, the employment is ended where the work has been concluded, and the workman has left the place of work, and is upon the road to his home.<sup>37</sup> But it has been said that

<sup>34</sup> A workman on a farm who is injured while going to his home but while still on the master's premises is injured by accident "arising out of and in the course of his employment," although he was paid by the piece, and had completed a piece when he left off work. *Taylor v. Jones* (1907; C. C.) 123 L. T. Jo. (Eng.) 553, 1 B. W. C. C. 3.

See also *Blovelt v. Sawyer* (Eng.) note 32, supra.

<sup>35</sup> *Edwards v. Wingham Agri. Implement Co.* [1913] 3 K. B. (Eng.) 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50, [1913] W. N. 221, 57 Sol. Jo. 701, 6 B. W. C. C. 511 (workman riding home on bicycle).

In *Kelly v. The Foam Queen* (1910) 3 B. W. C. C. (Eng.) 113, *Cozens-Hardy, M. R.*, said: "We have pointed out, not once or twice, but often, that save in exceptional circumstances the act does not extend to and protect a man when on his way from his house to his employment."

<sup>36</sup> No compensation is allowable for injuries to a workman on his way to his work and on the employer's premises, but before his duties began. *Anderson v. Fife Coal Co.* (1910) 47 Scot. L. R. 3 [1910] S. C. 8, 3 B. W. C. C. 539; nor where a newly engaged shepherd, while being transported with his family and chattels to the cottage that he was to occupy on the farm, fell from the wagon and was killed. *Whitbread v. Arnold* (1908) 99 L. T. N. S. (Eng.) 103.

Where an employee of railroad contractors engaged in ballasting a railroad siding was run over by a train about seven minutes before the hour for commencing work, at a point several hundred yards from the work, as he was proceeding, in accordance with his employer's directions, along the main track, for the purpose of going to work, this was not an accident arising out of, and in the course of, his employment. *Holness v. Mackay* [1899] 2 Q. B. (Eng.) 319, 68 L. J. Q. B. N. S. 724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 Times L. R. 351 (*Romer, L. J.*, dissenting).

A workman employed at a coal mine, injured while going from his house to his work by the usual road and while crossing a railway belonging to his employers, is not within the protection of the act, although the place of the accident was part of the mine within the meaning of the coal mines regulation act 1887, and the workman might have been required to work there under his contract of service, when, in point of fact, his only duties at the time were those of a miner underground, and did not actually commence until he L.R.A.1916A.

arrived at the lamp cabin, 360 yards distant from the scene of the accident. *Anderson v. Fife Coal Co.* (Scot.) supra.

In *Davies v. Rhymney Iron Co.* (1899) 16 Times L. R. (Eng.) 329, 2 W. C. C. 22, it was held that a workman who was injured at a point  $\frac{1}{4}$  of a mile from his place of work, while alighting from a train furnished by the employer for the convenience of the workmen, but which they were not required to ride upon, did not suffer from injury from accident arising "out of and in the course of" the employment.

The fact that employers gave a workman who was employed as a ship scaler a return ticket from a station near his home to a station near the dock in which the vessel upon which he was at work lay did not make him in the employment from the time he reached the first station, so as to render the employers liable for compensation for injuries received by him after he reached the docks, caused by his making a mistake as to the location of the gangway, and falling into the dock. *Nolan v. Porter* (1909) 2 B. W. C. C. (Eng.) 106.

Injury to a workman by strikers while he was on his way to the place of work and about seven minutes' walk therefrom did not arise out of and in the course of his employment. *Poulton v. Kelsall*, [1912] 2 K. B. (Eng.) 131, 81 L. J. K. B. N. S. 774, 106 L. T. N. S. 522, 28 Times L. R. 329, [1912] W. C. Rep. 295, [1912] W. N. 98, 5 B. W. C. C. 318. It was further held that an agreement by the master to compensate the workman for any injuries which arose from the strike did not have the effect of making the employer liable under the compensation act, although it might have afforded the workman a remedy at common law.

<sup>37</sup> In a Scotch case recovery was denied where a workman who, after the conclusion of his day's work, was walking home along a private railway track belonging to his employer, was run over at a point about 230 yards from the place where he worked. *Caton v. Summerlee & M. Iron & Steel Co.* (1902) 4 Sc. Sess. Cas. 5th series, 989, 39 Scot. L. R. 762, 10 Scot. L. T. 204.

A workman did not suffer injury by accident arising out of or in the course of his employment, where he was injured on his way home from work, along a public footpath, although the path had been dedicated to the public by the employers, over whose land it ran. *Williams v. Smith* (1913) 108 L. T. N. S. (Eng.) 200, [1913] W. C. & Ins. Rep. 146, 6 B. W. C. C. 102.

A workman whose duties were entirely

the moment that actual work begins cannot be taken as the true moment of the commencement of the employment, for the purposes of the act.<sup>38</sup> Nor can the moment that the actual work stops be considered as the time of the termination of the employment.<sup>39</sup> So a miner, injured while riding from his home to the mine on a train provided by the employer, in accordance with the terms of

the contract of employment, suffers injury by accident arising out of the employment.<sup>40</sup> And recovery may be had for an accident occurring before the place of work was reached, if, during the antecedent period within which it occurred, the servant was, as a matter of fact, under the master's control.<sup>41</sup> The mere fact, however, that the workman is on the employer's premises is not

underground did not suffer injury by accident arising out of and in the course of his employment, where he was injured after he had finished his work and was above ground, at a place about 400 yards from the shaft mouth, and 280 yards from the colliery office. *Graham v. Barr* [1913] S. C. 538, 50 Scot. L. R. 391, [1913] W. C. & Ins. Rep. 202, 6 B. W. C. C. 412.

Compensation is not recoverable where a workman had concluded his work, and was injured while riding to his home on a bicycle, along the main road. *Edwards v. Wingham Agri. Implement Co.* [1913] 3 K. B. (Eng.) 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50, [1913] W. N. 211, 57 Sol. Jo. 701, 6 B. W. C. C. 511.

<sup>38</sup> *Cross, T. & Co. v. Catterall*, an unreported decision of the House of Lords, cited in *Hoskins v. Lancaster* (1910) 26 Times L. R. (Eng.) 612, 3 B. W. C. C. 476. In the latter case it was held that a collier who was injured by the slamming of an iron gate on the employer's premises, which he was obliged to pass through to go to his work, was injured by accident arising out of his employment, although the gate in question was 150 yards away from the lamp room of the mine, through which the collier was obliged to go on his way to work.

In *Lawless v. Wigan Coal & I. Co.* (1908) 124 L. T. Jo. (Eng.) 532, 1 B. W. C. C. 153, the court said: "The authorities clearly decide that if a workman arrives at the master's premises where he is employed at, or within a reasonable margin before, the time at which he is due to commence work, and, whilst physically engaged in making his way from the entrance of the master's premises to the place where he works, meets with an accident, it is open to the judge to say that the accident arose out of and in the course of his employment."

Where the employees came to their work by a train which arrived about twenty minutes before the actual work began, and, to the knowledge of the employer, customarily spent the twenty minutes in getting refreshment in a mess cabin maintained by the employer for them, a workman who, while proceeding to deposit his ticket at the ticket office as he was required to do by the rules of the employer, fell into an excavation near the ticket office, about twenty minutes before the work began, was injured by accident arising out of and in the course of his employment. L.R.A.1916A.

*Sharp v. Johnson* [1905] 2 K. B. (Eng.) 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482.

<sup>39</sup> In *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. (Eng.) 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42. *Cozens-Hardy, M. R.*, said that the course of the collier's employment is not limited at one end by the moment when he gets to the place where he is to use his pick, or at the other end by the moment when he comes up from the pit, but it must include a reasonable interval of time and of space during which the employment lasts. In this case the collier was injured in leaving the pit, while trying to get under some trucks standing over the route which the colliers usually took.

<sup>40</sup> *Cremins v. Guest* [1908] 1 K. B. (Eng.) 469, 77 L. J. K. B. N. S. 326, 24 Times L. R. 189, 98 L. T. N. S. 335, 1 B. W. C. C. 160; *Walton v. Tredegar Iron & Coal Co.* [1913] W. C. & Ins. Rep. (Eng.) 457, 6 B. W. C. C. 592.

<sup>41</sup> As, where an engine cleaner who had been conveyed free of charge in his employer's train to the place where he was to do his work was run over while crossing the line to reach the shed where the engines were standing. *Holmes v. Great Northern R. Co.* [1900] 2 Q. B. (Eng.) 409, 83 L. T. N. S. 44, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 16 Times L. R. 412, distinguishing between the beginning of the employment and the beginning of work.

The accident arose "out of and in the course of his employment," where a miner, while proceeding above ground to his work, slipped and broke his leg upon rails belonging to the mine, leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between 9 and 13 feet from the doorway. *Mackenzie v. Coltness Iron Co.* (1903) 6 Sc. Sess. Cas. 5th series (Scot.) 8. Lord McLaren said: "I think the words 'in the course of his employment' cover any part of the undertaking in which the man may legally be for the purposes of his employment and in the pursuance of his employment."

A miner's employment has begun where he has been given his pit lamp and "tal-lies," and is awaiting at the pit brow his turn to enter the cage. *Fitzpatrick v. Hindley Field Colliery Co.* (1901) 4 W. C. C. (Eng.) 7.



sufficient to render him in the employment.<sup>42</sup>

Injuries received while the employee is obeying the directions of a superior arise out of and in the course of the employment;<sup>43</sup> and this is so even if the act in question is outside the scope of the regular employment,<sup>44</sup> and, to the knowledge of the workman, the order is contrary to the rules of the establish-

ment;<sup>45</sup> and a boy may recover if he is injured while obeying an adult employee, although as a matter of fact such adult does not have any authority over the boy.<sup>46</sup>

Where the accident was caused by the intoxication of the workman at a time when he was not actually engaged in his duties his injuries do not arise out of the employment.<sup>47</sup> But it has been held that

<sup>42</sup> An accident to a workman, caused by slipping on some ice at a point a quarter of a mile from his place of work, does not arise out of and in the course of his employment, although he was on the employer's premises at the time. *Gilmour v. Dorman* (1911) 105 L. T. N. S. (Eng.) 54, 4 B. W. C. C. 279.

A miner who on going to his place of work takes, with the employer's permission, a short cut over the employer's premises, and slips on some steps about  $\frac{1}{4}$  of a mile from the place of work, does not suffer injury by accident arising "out of and in the course of" his employment. *Walters v. Staveley Coal & I. Co.* (1911: H. L.) 105 L. T. N. S. (Eng.) 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303.

<sup>43</sup> A fruit picker who meets with an accident in going from one part of the farm to another at the direction of the foreman suffers an accident arising out of and in the course of his employment. *Jesson v. Bath* (1902; C. C.) 113 L. T. Jo. (Eng.) 206, 4 W. C. C. 9.

A workman in a mine, who a few days after leaving off work went into the mine, with the permission of the manager, to get his tools, and was injured by the fall of a stone, suffered injury by accident arising "out of and in the course of" his employment. *Molloy v. South Wales Anthracite Colliery Co.* (1910) 4 B. W. C. C. (Eng.) 65.

Where the workman's injury was caused by a rock which fell while he was shoveling ore in a chute in pursuance of an order from a superior servant. *Cervio v. Granby Consol. Min. Smelting & Power Co.* (1910) 15 B. C. 192.

<sup>44</sup> A girl in a machine shop who attempts to remove a piece of tin which has jammed the machine, in accordance with the directions of a superior, is not outside of her employment, although ordinarily she has nothing to do with the operation of the machine. *Geary v. Ginzler* [1913] W. C. & Ins. Rep. (Eng.) 314, 108 L. T. N. S. 286, 6 B. W. C. C. 72.

The scope of the employment of a boy employed to truck wood away from a machine was enlarged by the command of the employer, who, seeing him doing nothing, ordered him to find a job, so that he may recover compensation for injuries received in attempting to clear the suction pipe of the machine. *Lane v. Lusty*, [1915] 3 K. B. (Eng.) 230, 84 L. J. K. B. N. S. 1342, [1915] W. N. 252.

<sup>45</sup> *Satham v. Galloways* (1900; C. C.) 109 L. T. Jo. (Eng.) 133, 2 W. C. C. 149. L.R.A.1916A.

<sup>46</sup> Where a boy thirteen years of age, employed to do various kinds of work under the direction of a foreman, was told by an adult workman that the foreman said he was to oil a machine, and was injured while so doing, the finding of the county court that the injury arose out of and in the course of his employment will be sustained. *Brown v. Scott* (1899) 1 W. C. C. (Eng.) 11.

In *Brown v. Scott* (1899) (Eng.) supra, the court of appeal (Williams, L. J., dissenting) allowed recovery to be had for an injury received by a boy who undertook to oil a machine while in motion, in compliance with the order of a fellow workman, who had no authority over him, but told him falsely that his foreman had given the direction thus conveyed to him.

<sup>47</sup> A commercial traveler, who goes to a town but makes no attempt to transact business, and becomes intoxicated, and while at the station awaiting the train home, is injured by a passing train, does not suffer injury by accident arising out of and in the course of his employment. *M'Crae v. Renfrew* (1914) 2 Scot. L. T. 354, 51 Scot. L. R. 467, 7 B. W. C. C. 898. The Lord Justice-Clerk said: "The only statement of fact regarding his being there is that he got himself into such a state of intoxication that when he went to a second public-house, his condition was such that he was refused when he asked for a drink because he was intoxicated. He was therefore unfit for business and was not in the course of his employment. He had chosen to take to a course of conduct which was inconsistent with his actions being in the course of his employment. I can not for my part accept the idea that having gone out of the course of his employment, he entered it again that night because he set off in his staggering drunken state to endeavor to get home. To me it appears just to say that a man, the course of whose ordinary employment would cover his return home after a journey, may break off from the course of his employment, and that it is entirely a question of circumstances whether he can be held to have taken up the course of his employment again merely because he later proceeds to make his way home."

The drunkenness of a mate and not a risk incident to his employment must be held to have been the cause of his death where he appeared on the bridge in such a condition of intoxication that the master ordered him below and he did not imme-

if the injury occurred while the workman was at his required work, and was of such a character that it might have occurred had he been entirely sober, it

arose out of the employment, although as a matter of fact it was caused by his intoxicated condition, and he was guilty of serious and wilful misconduct.<sup>48</sup>

diately obey such orders but was last seen about eight of ten minutes after receiving the order standing at the head of the ladder by which the bridge was reached, and shortly thereafter a thud was heard and he was found in an unconscious condition at the foot of the ladder, nobody having seen him fall, and it not being proved whether he fell while attempting to obey the orders and descend the ladder. *Murphy v. Cooney* [1914] 2 I. R. 76, [1914] W. C. & Ins. Rep. 45, 48 Ir. Law Times, 13, 7 B. W. C. C. 962.

The second mate of a vessel who was ordered by the captain to go to his room because of his intoxicated condition and who instead of obeying the captain went aft to speak to the chief engineer and on his way fell down the hatch and was injured, does not suffer injury by accident arising out of his employment. *Horsfall v. The Jura* [1913] W. C. & Ins. Rep. (Eng.) 183, 6 B. W. C. C. 213.

The fact that a sailor has reached the vessel is not sufficient, if he reaches it in such a state of intoxication that he cannot perform his duty, and such intoxication is the cause of his death. *Frith v. The Louisianian* [1912] 2 K. B. (Eng.) 155, 81 L. J. K. B. N. S. 701, [1912] W. C. Rep. 285, 5 B. W. C. C. 410, 106 L. T. N. S. 667, [1912] W. N. 98, 28 Times L. R. 331, *Buckley, L. J.*, said: "The whole question here is whether the accident to this man arose out of his employment. I have not the smallest hesitation in answering that in the negative. It arose out of the fact that he was so hopelessly drunk that he could not stand, and I doubt whether he could see. He had gone on shore without leave, which by itself is misconduct, and had got drunk there; he came back so drunk that he was thrown on the deck like a sack of sand; he staggered to his feet after a minute or two and fell over the side of the ship. He was not engaged on his employment; he was not fit for the performance of his employment. If he had been in his employment he would not have been in that part of the ship, but elsewhere. He was within the ambit of the employment in the sense that he was on board the ship; but the accident did not arise out of his employment, but out of the fact that he was so drunk that he could neither stand nor see."

In *O'Brien v. Star Line* (1908) 45 Scot. L. R. 935, 1 B. W. C. C. 177, where a seaman who had returned to his ship late at night the worse for liquor, was found the next morning lying in the bottom of a hole, and there was no evidence as to how he came there and the door through which he fell had been locked and bolted as usual the night before but was found broken open in the morning and there was no evidence as to how or when it was so broken, it was L.R.A.1916A.

held that the applicant had not met the burden resting upon him of proving that the accident arose "out of" as well as in the course of the employment. Lord McLaren said: "Now, in a certain sense this may be described as an accident arising in the course of the employment, because O'Brien was bound by the terms of his employment to be on board ship at night, and if he had not been in the employment of the Star Line the accident could not have happened. But this consideration does not solve the question, because the employer is only liable to make compensation for an accident arising 'out of' the employment, which I take to mean that there must be some causal relation between the employment and the accident. On the facts stated, the accident is wholly unexplained."

Where a sailor returned to a ship in a drunken condition and in going up a gangway from the quay to the ship, he let go his hold of the hand rope and fell on the quay, receiving injuries from which he died, the injury is due entirely to the man's drunkenness and his widow is not entitled to compensation. *Nash v. The Rangatira* [1914] 3 K. B. (Eng.) 978, 83 L. J. K. B. 1496, [1914] W. N. 291, 111 L. T. N. S. 704, 58 Sol. Jo. 705, 7 B. W. C. C. 590.

<sup>48</sup> Where a stableman was required in the furtherance of his duties to go to a loft by ascending a ladder he was within the course of his employment, and if he slipped from the ladder and fell, he suffered injury by accident arising out of and in the course of his employment, notwithstanding the slipping was due to his intoxicated condition, and he was consequently guilty of serious and wilful misconduct. *Williams v. Llandudno Coaching & Carriage Co.* (1915) 31 Times L. R. (Eng.) 186, 84 L. J. K. B. N. S. 655, [1915] W. C. & Ins. Rep. 91, [1915] W. N. 52, 59 Sol. Jo. 286, 8 B. W. C. C. 143. The master of the rolls laid down the principle that a workman who, while doing an act which it was his duty to do, met with an accident to which he was more exposed than persons who were not so engaged, was, or in case of death, his dependents were, entitled to compensation from the employer, although the act was done negligently or contrary to rules.

An engine driver who while driving a traction engine, fell off the foot plate and was fatally injured, suffered an accident arising out of the employment, although he was under the influence of drink and unfit for work at the time. *Frazer v. Riddell* [1914] S. C. 125, 2 Scot. L. T. 377, 51 Scot. L. R. 110, 7 B. W. C. C. 841. The Lord President said: "A man may be engaged in the performance of his work, and an accident may occur incidental to his work, and therefore 'out of' his employment, even although he is in a state of intoxication so great as to be, in the opinion



Where an assault is such as is likely to happen because of the nature of the work being performed, it has been held to arise out of the employment.<sup>49</sup> An iron moulder's helper, who, while working in a stooping position in close proximity to boxes of molten metal, was

struck by an intoxicated stranger, and fell and was burned by the metal, suffered injury by accident arising out of and in the course of his employment.<sup>50</sup> And an engine driver who was struck by a stone wilfully let drop by a boy from an overhead bridge was held to have

of ordinary people, unfit for the performance of his work. If an accident befalls him under these conditions, it appears to me that, owing to his intoxicated condition, it is rightly called an accident due to serious and wilful misconduct, but it is none the less an accident arising 'out of' his employment because it is incidental to it."

<sup>49</sup> An assistant school master in an industrial school, who died from the fracture of the skull and other injuries, the result of an assault committed upon him by several boys of the school in pursuance of a prearranged plan, suffered an injury by accident arising out of and in the course of his employment. *Trim Joint Dist. School v. Kelly* [1914] A. C. (Eng.) 667, 111 L. T. N. S. 306, 30 Times L. R. 452, [1914] W. N. 177, 83 L. J. P. C. N. S. 220, 58 Sol. Jo. 493, 48 Ir. Law Times, 141, [1914] W. C. & Ins. Rep. 359, 7 B. W. C. C. 274.

This decision in effect overruled a Scotch case in which it was held that a workman assaulted by strikers was not injured by accident arising out of the employment. *Murray v. Denholm*, [1911] S. C. 1087, 48 Scot. L. R. 896, 5 B. W. C. C. 496. The lord justice-clerk had said: "It was the act of persons who had given up their situations for reasons of their own, and who, with the intention of doing violence, forced their way into the premises, and, having forcibly overcome the police, proceeded to do violence to persons lawfully there. In these circumstances, how can the injury suffered by the workmen be held to have arisen out of his employment? He was lawfully employed, he was within the enclosed premises of his master, he had the protection of the police. It was only by the persistent violence of the strikers that he came into any danger. That they desired to drive him out of his employment is certain. They were venting their ill-will on him because he chose to accept employment, and to work perfectly legally and in the due exercise of personal liberty. Is it to be held that in every case where violence or bloodshed are resorted to in disputes as to wages, such violence and bloodshed are to be held to arise out of the employment of the injured party? Of course, in a sense, it is the fact of his employment that induces the malicious persons to do him injury. But while the injury is done because he has undertaken the employment, it does not arise out of the employment. It arises out of the frame of mind of the attacker, whose act is malicious and criminal."

Compensation was allowed where a cashier who was traveling with a large sum of L.R.A.1916A.

money was set upon and killed by robbers. *Nisbet v. Rayne* [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 368. *Farwell, L. J.*, said: "I have come to the conclusion that there is a distinct and well-known risk run by cashiers and the like, who are known to carry considerable sums in cash on regular days by the same route to the same place, of being robbed, and, if they do their duty by defending their charge, murdered, and that such a risk is as incidental to their employment as the risk from missiles from bridges is to the employment of engine drivers, or the risk of injury by poachers to that of gamekeepers."

Where the foreman of a company employed in moving furniture had the duty of deciding between applicants for odd jobs, and of letting out vans, and was assaulted by a man who had before been an applicant for odd jobs, but who on this occasion applied for a van, the injury was by accident arising out of the employment, although ordinarily there was no danger of assault from the applicants for vans. *Weekes v. Stead* [1914] W. N. (Eng.) 263, 30 Times L. R. 586, 58 Sol. Jo. 633, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 434, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 7 B. W. C. C. 398, 6 N. C. C. A. 1010. The fact that the yard in which the assault took place was an exceedingly rough place, and had been the scene of assaults in the past, distinguishes this case from *Mitchinson v. Day Bros.* (Eng.) note 52 infra.

<sup>50</sup> In *Shaw v. McFarlane* (1914) 52 Scot. L. R. 236, 8 B. W. C. C. 382, Lord Dundas said: "In the first place I think it is now fully settled that a claim for compensation under the act is not excluded merely because the accident was caused by the ultroneous or even the felonious act of a third party, provided the workman sustained it owing to his being specially exposed by the nature of his employment to the risk of danger which actually befell him. . . . Thus in the present case, if the burns and bruises directly resulted from an accident, viz., a fall which by the very nature of the respondent's employment was attended with special risk and danger of such consequences, the cases seem to show that the accident arose out of the employment, and that the court need not and ought not to inquire whether the fall itself was caused by something not arising out of, and indeed quite unconnected with, the employment, viz., the unwarrantable blow of an intoxicated stranger."

Lord Dundas also observed: "Considering this question apart from authority, and

suffered an injury by accident arising out of his employment;<sup>51</sup> but for the most part assaults are not considered as incident to the ordinary work performed by a workman.<sup>52</sup> No compensation is recoverable where one workman is injured by a stone thrown in anger by another workman.<sup>53</sup> There is an apparent inconsistency in these decisions, and this is emphasized by the fact that three judges dissented in the House of Lords decision which is first cited.

An injury received by a workman while he himself was deliberately assaulting a fellow workman was not caused by accident arising out of and in the course of the employment.<sup>54</sup> And an injury caused by an intentionally felonious assault by an employer upon the workman does not arise out of the employment.<sup>55</sup>

simply upon the facts proved, and the words of the statute in their natural and ordinary meaning, I should agree with the sheriff-substitute in holding that the accident arose out of the employment. One of the risks obviously incidental to the employment of this ironmoulder's helper was that of working in the immediate vicinity of the molten metal and heavy weights, and on the occasion in question he was working under these conditions, in a dangerous place and in a stooping position. The accident which befell him was, I take it, a fall, with the immediate result, naturally arising from his position and its attendant risks, of burns and bruises. I should have thought it idle to contend that because the accident, i. e., the fall, was caused by a blow struck by an outsider, we are to disregard the *causa proxima* of the injuries, viz., the fall in contact with hot metal and crushing weights, and ascribe the injuries to a more remote cause, viz., the blow, which clearly did not arise out of the employment."

<sup>51</sup> *Challis v. London & S. W. R. Co.* [1905] 2 K. B. (Eng.) 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486. Collins, M. R., said: "I do not think that there was anything in the fact that the stone was wilfully dropped, to prevent what happened from being an accident from the standpoint of the person who suffered through it. The question remains whether it was an accident which arose out and in the course of the deceased's employment. . . . In deciding that question we should [not] be justified in leaving out of sight what is matter of common knowledge and experience in relation to the subject with which we are dealing; and therefore we must, I think, approach the question whether what occurred was a risk incidental to the employment of an engine driver from the standpoint that a train in motion has great attractions for mischievous boys as an object at which to discharge missiles."

L.R.A.1916A.

Whether or not a sailor, who is injured while on shore, before he returns to his vessel, is injured by accident arising out of and in the course of his employment, is a question which has caused considerable conflict of opinion. It would seem clear that if he goes ashore on some duty directly connected with the vessel, he is clearly "in the course of" his employment, and the right to compensation depends solely upon the circumstances of the injury. But where he goes to shore for his own purposes, a far more difficult situation arises. It has been said that "an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do, within a time during which he is employed and at a place where he may reasonably be during that time."<sup>56</sup> So it has been held that a sailor who goes

<sup>52</sup> No compensation was allowed where the applicant was employed as a cook in a hotel wherein the kitchen and the bar were on the same level, and a drunken customer came out of the bar into the kitchen, where he had no business to be, and made a rush at the cook, who, in trying to avoid him, put her arm through a glass door. *Murphy v. Berwick* (1909) 43 Ir. Law Times, 126. Walker, L. C., said that the employer is not liable for the tortious act of a third party, where such act is not a risk reasonably to be contemplated by the employee in taking the employment.

Nor where a foreman of sewage works was stabbed by a drunken man during a fight on the street where the pipes were being laid. *Collins v. Collins* [1907] 2 I. R. (Ir.) 104.

The risk of being assaulted by a drunken man is not in any way especially connected with or incident to employment as a carter. *Mitchinson v. Day Bros.* [1913] 1 K. B. (Eng.) 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, [1913] W. N. 36 [1913] W. C. & Ins. Rep. 324, 6 B. W. C. C. 190.

<sup>53</sup> *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. (Eng.) 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648.

An injury to a boy engaged in picking stone and "bats" out of coal running past in a belt and who was hit in the eyes by a stone maliciously thrown by a boy who was likewise engaged, did not arise out of the employment. *Clayton v. Hardwick Colliery Co.* (1914) 7 B. W. C. C. (Eng.) 643.

<sup>54</sup> *Shaw v. Wigan Coal & I. Co.* (1909) 3 B. W. C. C. (Eng.) 81.

<sup>55</sup> *Blake v. Head* [1912] W. C. Rep. (Eng.) 198, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303. It was pointed out that the workman's remedy was by an action for assault.

<sup>56</sup> Lord Loreburn in *Moore v. Manchester Liners* [1910] A. C. (Eng.) 498. He fur-



on shore with leave is still in the course of his employment, although he has gone there for purposes of his own.<sup>57</sup> In several cases in which this principle has been applied, the sailor took an unusual or dangerous method to reach the vessel from the quay, but this fact was considered insufficient to prevent recovery.<sup>58</sup>

But although a sailor may be "in the course of" his employment while return-

ing from shore, where he has been on his own business, he does not suffer injury by accident arising "out of" his employment, where the injury occurs before he has reached the gangway or other approach to the vessel, although he is on the dock, making his way to the vessel. Risks of such injuries are not incident to the employment.<sup>59</sup> The same rule would, of course, apply in the case

ther said: "It may seem at first sight that this is a formidable interpretation. It is not so in reality, because in every case the accident, to be a ground for compensation, must also be one arising out of the employment [and it is not often that such risks are run, except at the place where the man's work is to be done]. A seaman, for example, who is ashore on leave, and is knocked down by a wagon, is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business, he is doing that errand in the same position as a messenger, and is protected against the same risks."

<sup>57</sup> "The return of the man (a sailor) to his ship was in the course of his employment." Lord Loreburn, L. C., in *Kitchenham v. The Johannesburg* [1911] A. C. (Eng.) 417, [1911] W. N. 142, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311.

<sup>58</sup> In *Robertson v. Allan Bros.* (1908) 77 L. J. K. B. N. S. (Eng.) 1072, 98 L. T. N. S. 821, 1 B. W. C. C. 172, compensation was allowed where a ship steward on returning from shore, where he had gone for his own purposes during a time when he had a right to be on shore, attempted to board the vessel by means of the cargo skid, as the sailors were in the custom of doing, and fell, receiving injuries from which he died.

Where a fireman on a ship fell from a ladder which was the only means of access to the ship as he was returning from shore, whence he had gone to make certain purchases for himself the injury arises in the course of the employment. *Moore v. Manchester Liners* [1910] A. C. (Eng.) 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527, reversing [1909] 1 K. B. (Eng.) 417, 100 L. T. N. S. 164, 78 L. J. K. B. N. S. 463, 25 Times L. R. 202.

See also *Kearon v. Kearon* (1911) 45 Ir. Law Times, 96, 4 B. W. C. C. 435, cited in note 61 infra.

<sup>59</sup> Recovery was refused where there is no proof that a sailor who had been on shore on leave, and was drowned while returning to the vessel, had reached the gangway when he fell. *Kitchenham v. The Johannesburg* [1911] A. C. (Eng.) 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311, affirming the Court of Appeal in [1911] 1 K. B. (Eng.) 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 91 L.R.A.1916A.

(accident arose in the course of his employment, but not out of it).

And where a sailor returning to his ship from a week-end at his son's house slipped on some public steps leading to the river. *Kelly v. The Foam Queen* (1910) 3 B. W. C. C. (Eng.) 113.

And where the master of a vessel, who goes ashore for his own purposes, as he has a right to, falls off the pier as he is waiting for a boat from his vessel. *Fletcher v. The Duchess* [1911] A. C. (Eng.) 671, 81 L. J. K. B. N. S. 33, 55 Sol. Jo. 598, 4 B. W. C. C. 317, 105 L. T. N. S. 121.

And where a seaman who had gone on shore with leave, for his own purposes, and found upon his return that the ship had moved to another part of the dock, made his way along the dockside where there were many railway lines, and was struck by a train and injured. *Biggart v. The Minnesota* (1911) 5 B. W. C. C. (Eng.) 68.

The risk of falling off the edge of a quay into the water is common to everyone, and such an accident, happening to a sailor who had been on land and was returning to his vessel, did not arise out of the employment, where he had not reached the gangway. *Craig v. The Calabria* [1914] S. C. 762, 2 Scot. L. T. 30, 51 Scot. L. R. 657, 7 B. W. C. C. 932. Lord Dundas said: "I think the case would have been materially different if, at the time of the accident, the man had reached the gangway, and fallen off it into the water, and the risk was one due to the means of access to the ship."

The death of a ship's engineer did not arise out of and in the course of his employment, where in attempting to reach his ship, about 100 yards from the shore, where he had been on a legitimate purpose, he entered a life boat usually manned by six men, and tried alone to reach the ship by paddling with the rudder, but was carried out to sea and was drowned. *Halvorsen v. Salvesen* (1911) 49 Scot. L. R. 27.

The finding by the county court judge that a fireman on a vessel was not in the ambit of his employment will be sustained where the evidence showed that he had gone on shore, and at the time of the accident was walking along a jetty so as to get near to his vessel to hail it for a boat, and there was no evidence as to when he went ashore, or whether he was on the ship's business, or whether he had leave or not. *Dixon v. The Ambient* [1912] W. C. Rep. (Eng.) 224, 5 B. W. C. C. 428.

A fireman who goes ashore with leave to buy provisions, and is drowned on his return

of a sailor leaving the vessel.<sup>60</sup> But if the sailor has reached the gangway upon his return to the vessel, the accident may be found to arise out of the employment.<sup>61</sup>

In the cases cited below it was held that a sailor who, upon returning from shore, was injured while using a ladder or gangway or other means of access to the vessel, suffered injury by accident arising out of the employment, although the special point decided was that the

injury occurred in the course of the employment.<sup>62</sup>

The Irish court of appeal has apparently taken the position that the sailor must be back upon the vessel itself before he can be held to have returned to his employment.<sup>63</sup>

The burden of proving that an accident arose out of and in the course of the workman's employment lies on the plaintiff.<sup>64</sup> It is not sufficient to prove

to the vessel by falling off the pier, is not within the scope of the act, although the provision in the contract of service, that the master was to supply the sailors with provision was stricken out, and across it was written, "Crew to provide their own provision." *Parker v. The Black Rock* [1914] 2 K. B. (Eng.) 39, 83 L. J. K. B. N. S. 421, 110 L. T. N. S. 520, 30 Times L. R. 271, 58 Sol. Jo. 285, [1914] W. N. 43, [1914] W. C. & Ins. Rep. 117, 7 B. W. C. C. 152. The position taken by the court was that, notwithstanding he was to provide for himself, this did not constitute a contractual obligation, and consequently it must be held that he went ashore upon his own business. This decision was sustained by the House of Lords, [1915] A. C. (Eng.) 725, 31 Times L. R. 432, [1915] W. N. 204.

<sup>60</sup> Where a sailor upon the completion of the voyage had been discharged and had left the ship, but was on a floating stage to which the ship was moored, and was making his way to the shore, and fell between it and the quay and was drowned, the accident did not arise in the course of his employment. *Cook v. The Montreal* [1913] W. C. & Ins. Rep. (Eng.) 206, 103 L. T. N. S. 164, 29 Times L. R. 233, 57 Sol. Jo. 282, 6 B. W. C. C. 220.

<sup>61</sup> Recovery is allowable where a sailor who had been on shore on leave, and was drowned while returning to the vessel, fell after he had reached the gangway and was crossing it. *Leach v. Oakley* [1911] 1 K. B. (Eng.) 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 91.

A sailor returning to his vessel from the shore where he had been on leave, on business of his own, is entitled to compensation for injuries received in jumping from the pier to the vessel, there being no other means of getting on board. *Kearon v. Kearon* (1911) 45 Ir. Law Times, 96, 4 B. W. C. C. 435.

A sailor who upon returning from shore had passed over the gangway, and had one foot upon the rail and one upon the deck, when he overbalanced and fell into the water and drowned, suffered death from accident arising "out of and in the course of his employment." *Canavan v. The Universal* (1910) 3 B. W. C. C. (Eng.) 355.

<sup>62</sup> *Robertson v. Allan Bros.* (1908) 77 L. J. K. B. N. S. (Eng.) 1072, 98 L. T. N. S. 821, 1 B. W. C. C. 172, *Kearon v. Kearon* (1911) 45 Ir. Law Times, 96, 4 B. W. C. C. L.R.A.1916A.

435, and *Moore v. Manchester Liners* [1910] A. C. (Eng.) 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527, reversing the court of appeal [1909] 1 K. B. (Eng.) 417, 100 L. T. N. S. 164, 78 L. J. K. B. N. S. 463, 25 Times L. R. 202. These cases are cited in note 58 supra.

<sup>63</sup> The injury to a sailor who fell from the gangway into the water while returning to his ship from a trip on shore, which was not connected with his employment, does not arise out of and in the course of his employment. *Hyndman v. Craig* (1911) 45 Ir. Law Times, 11, 4 B. W. C. C. 438. Sir Samuel Walker, L. C., in a very brief paragraph upholding the decision of the recorder denying recovery, said: "Was the deceased in his ship when he met with the accident? He was still using the means of getting there."

<sup>64</sup> *McNicholas v. Dawson* (1899) 68 L. J. Q. B. N. S. (Eng.) 470 [1899] 1 Q. B. 773, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242; *Pomfret v. Lancashire & Y. R. Co.* [1903] 2 K. B. (Eng.) 718, 72 L. J. K. B. N. S. 729, 52 Week. Rep. 66, 89 L. T. N. S. 176, 19 Times L. R. 649; *McDonald v. The Banana* [1908] 2 K. B. (Eng.) 926, 78 L. J. K. B. N. S. 26, 99 L. T. N. S. 671, 24 Times L. R. 887, 52 Sol. Jo. 741; *Charles v. Walker* (1909) 25 Times L. R. (Eng.) 609; *Hewitt v. The Duchess* [1910] 1 K. B. (Eng.) 772, 79 L. J. K. B. N. S. 867, 102 L. T. N. S. 204, 26 Times L. R. 300, 54 Sol. Jo. 325, 3 B. W. C. C. 239; *Jenkins v. Standard Colliery Co.* (1911) 28 Times L. R. (Eng.) 7 (death caused by blood poisoning following an abrasion of the skin; nothing to show that the abrasion was received in the employment); *Karemaker v. The Corsican* (1911) 4 B. W. C. C. (Eng.) 295 (sailor suffering from frost-bite did not prove that it was due to any particular circumstance of the employment); *O'Brien v. Star Line* [1908] S. C. (Scot.) 1258; *Carriek v. North British Locomotive Co.* [1909] S. C. (Scot.) 698; *M'Adam v. Harvey* [1903] 2 I. R. (Ir.) 511; *Gatton v. Limerick S. S. Co.* (1910) 44 Ir. Law Times 141 [1910] 2 I. R. 561; *Rayman v. Fields* (1910) 102 L. T. N. S. (Eng.) 154, 26 Times L. R. 274, 3 B. W. C. C. 123; *Astley v. Evans* [1911] 1 K. B. (Eng.) 1036, 80 L. J. K. B. N. S. 731, 104 L. T. N. S. 373, 4 B. W. C. C. 209, 3 N. C. C. A. 239; *Farmer v. Stafford* (1911) 4 B. W. C. C. (Eng.) 223; *Furnivall v. Johnson's Iron & Steel Co.* (1911) 5 B. W. C. C. (Eng.) 43; *Charvill v. Manser*



that a workman met with an accident in the course of the employment; it must also be proved that the accident arose "out of" the employment.<sup>65</sup> The finding that the accident arose out of and in the

course of the employment cannot be based on mere surmise, conjecture, and guess.<sup>66</sup> But if the claimant shows that the injury was one that might naturally follow an accident suffered in the em-

[1912] W. C. Rep. (Eng.) 193, 5 B. W. C. C. 385; Stapleton v. Dinnington Main Coal Co. (1912) 107 L. T. N. S. (Eng.) 247, 5 B. W. C. C. 602; Marshall v. Sheppard [1913] W. C. & Ins. Rep. (Eng.) 477, 6 B. W. C. C. 571; Sherwood v. Johnson [1913] W. C. & Ins. Rep. (Eng.) 57, 5 B. W. C. C. 686; Morgan v. Cynon Colliery Co. (1915) 8 B. W. C. C. (Eng.) 499; Hopley v. Pool (1915) 8 B. W. C. C. (Eng.) 512.

The burden is upon the dependent of a deceased workman who was employed as an engine driver, to show that, where after waiting for a while on his engine at a siding for an express train to pass, he got down from his engine and left the stoker in charge, he was in the course of his employment. Dyhouse v. Great Western R. Co. (1913) 109 L. T. N. S. (Eng.) 193, [1913] W. C. & Ins. Rep. 491, 6 B. W. C. C. 691.

<sup>65</sup> Pomfret v. Lancashire & Y. R. Co. [1903] 2 K. B. (Eng.) 718, 72 L. J. K. B. N. S. 729, 52 Week. Rep. 66, 89 L. T. N. S. 176. Collins, M. R., said: "The burden, and the whole burden, of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant, and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him. In my opinion, the evidence in the present case is quite consistent with the view that the accident happened in consequence of something which did not arise out of the employment."

<sup>66</sup> Burwash v. Leyland (1912) 107 L. T. N. S. (Eng.) 735, 28 Times L. R. 546, 54 Sol. Jo. 703, [1912] W. C. Rep. 400, 5 B. W. C. C. 663.

Where upon medical evidence the arbitrator finds that the heat apoplexy from from which a ship stoker was suffering might have been caused by the heat of the sun or by the heat of the stoke holes, the arbitrator is justified in holding that the evidence will not permit him to draw the inference that the injury was caused by an accident arising out of and in the course of the employment. Olson v. The Dorset (1913) 6 B. W. C. C. (Eng.) 658.

The onus has not been discharged by the dependents of a crane-man in the boiler shop of locomotive works, who was found crushed on the top of a crane in connection with which he had no duty to perform where his presence thereon was wholly unaccounted for. Millers v. North British Locomotive Co. [1909] S. C. 698, 46 Scot. L. R. 755, 2 B. W. C. C. 80.

Where the applicant had suffered an injury to his hand in 1902, and in 1908 his hand became inflamed, swollen, and pain-

ful, and incapacitated him for work, but the medical evidence was to the effect that such incapacity was not caused by the first injury, but by another injury, as to which there was no evidence when it occurred, an award of compensation given on the theory that the incapacity was the result of the first injury will be set aside. Noden v. Galloways [1912] 1 K. B. (Eng.) 46, [1911] W. N. 192, 81 L. J. K. B. N. S. 28, 105 L. T. N. S. 567, 28 Times L. R. 5, 55 Sol. Jo. 838, [1911] W. C. Rep. 63, 5 B. W. C. C. 7.

A county court judge is not justified in drawing an inference which is only based upon surmise and conjecture. Pugh v. Dudley [1914] W. C. & Ins. Rep. (Eng.) 265, 7 B. W. C. C. 528. In this case, an explosion of powder caused the death of the workman, and the explosion must have been due to the fact that the powder had been uncovered. The county court judge drew the inference that as the workman was the only person who was handling the powder, he himself must have uncovered it; but the court of appeal held that such an inference was wholly unwarranted.

A county court judge's explanation that an accident arose out of and in the course of the employment, if founded merely on surmise, cannot be sustained, although such explanation is by no means improbable. Booth v. Leeds & L. Canal Co. [1914] W. C. & Ins. Rep. (Eng.) 310, 7 B. W. C. C. 434.

The county court judge is not justified in drawing the inference of injury from accident arising out of and in the course of the employment, where a collier died of blood poisoning due to an abscess in the knee, and there was no evidence as to how the abscess was caused, except that his work was in a very narrow space, which necessitated his working on his knee. Howe v. Fernhill Collieries [1912] W. C. & Ins. Rep. (Eng.) 408, 107 L. T. N. S. 508, 5 B. W. C. C. 629.

That an abrasion on a collier's thumb might have been caused by his work is not sufficient to entitle him to compensation. Jenkins v. Standard Colliery Co. (1911) 105 L. T. N. S. (Eng.) 730, 28 Times L. R. 7, 5 B. W. C. C. 71.

Coal dust found in a scratch is not sufficient to show that the collier received the scratch while in his employment. Wood v. Davis (1911) 5 B. W. C. C. (Eng.) 113.

A workman who cut his finger at home, and subsequently contracted blood poison, cannot recover compensation, where the poison germs might have been conveyed into the wound in any one of several ways other than the employment. Chandler v. Great Western R. Co. [1912] W. C. Rep. (Eng.) 169, 106 L. T. N. S. 479, 5 B. W. C. C. 254.

ployment, the onus is upon the employer to show that the injury was due to some other cause.<sup>67</sup>

The unexplained drowning of a seaman not in the discharge of his actual duties furnishes no ground for drawing the inference that the accident arose in

the course of and out of the employment.<sup>68</sup> But where a sailor falls overboard in some unexplained way while discharging his duty, the inference may be drawn that the accident arose not only in the course of but also out of the employment.<sup>69</sup>

<sup>67</sup> Where the workman felt a pain in his knee as he was rising from a kneeling position, and it was found that the cartilage of his knee was ruptured, he suffered an injury by accident, entitling him to compensation, although he had, about three years previously, while in the employment of other employers, wrenched his knee and received compensation for some weeks, but thereafter had worked continuously as an ordinary workman to the time of the present injury. *Borland v. Watson* [1912] S. C. 15, 49 Scot. L. R. 10, 5 B. W. C. C. 514.

<sup>68</sup> In *Marshall v. The Wild Rose* [1910] A. C. (Eng.) 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514, 11 Asp. Mar. L. Cas. 409, 48 Scot. L. R. 701, affirming [1909] 2 K. B. (Eng.) 46, 78 L. J. K. B. N. S. 536, 100 L. T. N. S. 739, 25 Times L. R. 452, 52 Sol. Jo. 448, 2 B. W. C. C. 76, a sailor left his berth on a hot night to cool himself on the deck, and his body was found the next morning under the gunwale, where members of the crew sometimes sat down. No more was known about the occurrence. Although the court of appeal conceded or took it for granted that his death was due to accident, recovery was denied on the ground that the death did not arise out of as well as in the course of the employment. The language used in the judgment in the House of Lords indicated that in their opinion it could not be inferred that death was due to accident.

In *Bender v. The Zent* [1909] 2 K. B. (Eng.) 41, 78 L. J. K. B. N. S. 533, 100 L. T. N. S. 639, 2 B. W. C. C. 22, where a ship's cook on a perfectly calm day in mid Atlantic went on deck about 5 o'clock in the morning, it being daylight, and was last seen looking over the rail, and nothing more was known of him, his absence from the ship being discovered half an hour later, it was held that the burden of proving that the accident causing death arose "out of" as well as "in the course of" the employment had not been discharged by the applicant.

The widow of the engineer of a ship lying in a dry dock cannot recover compensation, where the only evidence produced by her was that the engineer, after completing his morning's work at the ship, went home to his dinner, and that he was seen talking to somebody on his way back just prior to the accident, and that his body was subsequently found in the dry dock. *Gilbert v. The Nizam* [1910] 2 K. B. (Eng.) 555, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455.

Where the only evidence in an application

for compensation on account of the death of a donkeyman on a steamship was an extract from the log, which stated that the deceased, while returning to the ship more or less under the influence of liquor, refused the aid of the night watchman or policeman, and on reaching the top step of the gangway suddenly overbalanced and fell, the applicant failed to prove that the accident arose out of and in the course of his employment. *McDonald v. The Banana* [1908] 2 K. B. (Eng.) 926, 78 L. J. K. B. N. S. 26, 99 L. T. N. S. 671, 24 Times L. R. 887, 52 Sol. Jo. 741, 1 B. W. C. C. 185.

The finding of the county court judge that the accident did not arise out of the employment will be sustained, where the evidence showed that a sailor was seen at 8 p. m., about to leave his ship to get provisions, and his body was found the next morning in the dock 10 or 15 feet from the gangway. *Mitchell v. The Saxon* (1912) 5 B. W. C. C. (Eng.) 623.

The county court judge is justified in holding that he was not satisfied that the death of the deceased was due to accident arising out of and in the course of his employment, where the deceased was a barge boatman, and had been talking with a fellow boatman on the wharf, and then walked away, carrying a boat hook to take his own full barge down to the dock, and six or seven minutes later the fellow boatman saw the body in the water 90 yards from the spot where they had parted, and about 20 yards from his barge. *Bines v. Gueret* [1913] W. C. & Ins. Rep. (Eng.) 158, 6 B. W. C. C. 120.

<sup>69</sup> There was evidence to support the inference that the accident arose out of the employment, where the workman was a ship fireman, and it was proved that in tropical regions, where the vessel was, it was the habit of the firemen to go on deck for fresh air, and that the fireman in question had worked longer hours than usual, owing to the ship being shorthanded, and was seen coming up on deck for water shortly before he was last seen in the stoke hole, and subsequently disappeared in some unexplained manner. *Lee v. Stag Line* (1912) 107 L. T. N. S. (Eng.) 509, 56 Sol. Jo. 720, [1912] W. C. Rep. 398, 5 B. W. C. C. 660.

Where an officer of a vessel who had previously complained of feeling dizzy disappeared in broad daylight and calm weather from the deck, where he had been on duty. *The Swansea Vale v. Rice* (1911) 104 L. T. N. S. (Eng.) 658, 27 Times L. R. 440, 55 Sol. Jo. 497, 4 B. W. C. C. 298, 48 Scot. L. R. 1095 (there was no suggestion of murder or suicide.) The order of court of appeal



Although the accident must be proved, and it cannot be based on mere surmise or guess, nevertheless it may be proved by circumstantial evidence. In the note below will be found a number of cases

in which it was held that the circumstances surrounding the accident were sufficient to prove that there had been an accident arising out of and in the course of the employment.<sup>70</sup>

was affirmed in [1912] A. C. (Eng.) 238, 81 L. J. K. B. N. S. 672, [1912] W. C. Rep. 242, 12 Asp. Mar. L. Cas. 47, 104 L. T. N. S. 658, 55 Sol. Jo. 497, 27 Times L. R. 440, Ann. Cas. 1912C, 899.

The death of the chief engineer of a steamer may be found to be due to an accident arising out of and in the course of the man's employment, where he was last seen behind the wheel house containing steam steering gear, and it was shown that the tips of the propeller were bent, and that the screw began to work faster than it should, and that the engineer was worried about the condition of the steering gear. *Proctor v. The Serbino* (1915) 31 Times L. R. (Eng.) 524. The master of the rolls said: "I think, too, that a sailor on board ship at sea, whose employment is continuous, stands in a somewhat special position, and that if it can be shown or properly inferred that, when last seen, he was engaged in doing his duty as a seaman, the court may presume that the accident with which he met arose out of his employment."

Where the body of a man employed on a vessel as a cook and steward, who was last seen alive lying in his bunk, was found on the following day in the sea a short distance from the vessel, and the medical evidence showed that his death was due to drowning, and he had never been seen the worse for liquor, but was subject to nausea, and had been frequently seen vomiting over the side of the vessel, the finding of the arbitrator that the accident arose out of and in the course of the man's employment must be affirmed, since there was evidence to support it. *Kerr (or Lendrum) v. Ayr Steam Shipping Co.* (1914; H. L.) 30 Times L. R. 664, [1914] W. C. & Ins. Rep. 438, [1914] W. N. 327, 58 Sol. Jo. 737, [1914] S. C. (H. L.) 91, 51 Scot. L. R. 733, 7 B. W. C. C. 801, reversing [1913] S. C. 331, 50 Scot. L. R. 173, [1913] W. C. & Ins. Rep. 10, 6 B. W. C. C. 326.

An arbitrator is justified in finding that the death of an engineer of a steam tug was due to an accident arising out of the employment, where he was seen at 5 A. M. in his bunk, and one hour afterwards his bunk was empty and his work clothes were beside it, and some days after his body was found clad in his night clothes, and death was caused by drowning, there being no suggestion of suicide. *Mackinnon v. Miller* [1909] S. C. 373, 46 Scot. L. R. 299.

In *Richardson v. The Avonmore* (1911) 5 B. W. C. C. (Eng.) 34, it was held that the county court might draw the inference that the death arose out of the employment, although there was no direct evidence, where the deceased was in charge of a ship lying in dock moored to a jetty, and it would appear from where his body was found that he had fallen into the dock from a L.R.A. 1916A.

point where he might have been, in the furtherance of his duties, to attend to the shore end of the mooring ropes.

<sup>70</sup> The county court judge may find that an injury to a boy employed in the defendant's boot and shoe factory arose out of his employment, where the employers claimed that the injury was caused by the boy's playing around a belt, and the boy claimed that he had not touched the belt with his hand that afternoon, but that his sleeve was caught in it and he was drawn around the machinery, and the county court judge accepted the story of the boy, although he further found that the belt catching in his shirt would not have been sufficient to draw him into the machinery, but that in all probability when the belt caught him in the shirt he put out his hand and grabbed the belt to release himself, and was thus drawn into the machinery. *Durrant v. Smith* [1914] W. C. & Ins. Rep. (Eng.) 282, 7 B. W. C. C. 415. The court took the view that the boy's statement that he had not touched the belt with his hand might mean no more than that he had not touched it while playing with it.

A county court judge was justified in finding that a mason's helper who was put to work to clean down the ceiling of an archway over a door in the building, which work was to be done in the inside, did not go outside of his employment in going upon some scaffolding outside of the archway, which had been left by some other workman, where there was some evidence to show that the work which he had to do could better be done from the outside than from the inside. *Roberts v. Trollop* (1914) 7 B. W. C. C. (Eng.) 678.

The county court judge is justified in inferring that the injury arose out of and in the course of the employment, where the evidence showed that the workman, who was a butcher's canvasser, and who rode a bicycle in the course of his work, arrived at his employer's shop in the morning, covered with mud and wheeling the machine, and was lame, and complained of injury caused by a slip of the machine. *Haward v. Rowsell* [1914] W. C. & Ins. Rep. (Eng.) 314, 7 B. W. C. C. 552.

A man employed as a stoker, who had been ruptured three or four years before, and was wearing a truss sufficient to prevent strangulated hernia under ordinary circumstances, who left home well and in excellent spirits, and shortly after his return to work was found to be in great agony, and died shortly afterwards from strangulated hernia, may be found to be suffering from injury by accident arising out of the employment, although there was no evidence as to how the hernia came down so as to strangle, nor of any specially heavy work done by the deceased

on that date to account for it. *Scales v. West Norfolk Farmers' Manure & Chemical Co.* [1913] W. C. & Ins. Rep. (Eng.) 165, 6 B. W. C. C. 188.

Where a workman employed by an undertaker and funeral contractor left home in the morning uninjured, and returned bearing injuries which were consistent with his having been bruised while carrying a coffin, the recorder may find that he suffered from accident arising out of and in the course of his employment. *Wright v. Kerrigan* [1911] 2 I. R. (Ir.) 301. Concerning the decision in *Mitchell v. Glamorgan Coal Co.* (1907) 23 Times L. R. (Eng.) 588, *Cherry, L. J.*, said: "Practically all that was proved there was that the man went out to his work uninjured, and that he came back with a crushed finger. But from that one fact the court of appeal held that the county court judge was at liberty to infer, first, that the injury was caused by an accident; secondly, that the accident arose in the course of the employment; and, thirdly, that it arose out of the employment."

Where a workman was set to do heavy work which was not his ordinary employment, and in an hour and a half was found in a very serious condition, necessitating the summoning of medical aid, and, upon his return to work a fortnight later, complained of a pain in his back, and subsequently had to go to a hospital, and died in about a month thereafter, the county court is justified in inferring that the injury was caused by accident arising out of and in the course of his employment. *Hewitt v. Stanley Bros.* [1913] W. C. & Ins. Rep. (Eng.) 495, 109 L. T. N. S. 384, 6 B. W. C. C. 501.

The arbitrator may find that a miner was injured by accident where, when he went to work at 5 o'clock in the morning, his knee was uninjured, and at 7 o'clock he was seen at work, with his knee apparently all right, and an hour or two afterwards he was not all right, but required help in pushing his tub, and was seen to rub his knee and limp a little, and went home just before 3 o'clock, and there was a slight bruise on his knee, and thereafter his knee became swollen, and he died about a week after from the injury to his knee, although there was no direct proof that he received the injury by contact with the tub which it was his duty to push. *Hayward v. Westleigh Colliery Co.* [1915] A. C. (Eng.) 540, 31 Times L. R. 215, [1915] W. N. 67, 59 Sol. Jo. 269, 84 L. J. K. B. N. S. 661, 8 B. W. C. C. 278, reversing court of appeal, [1914] W. C. & Ins. Rep. (Eng.) 21, 7 B. W. C. C. 53.

Where the deceased, a station policeman, might legitimately have been at the spot where he was injured in the course of his duties, the presumption is that he had been injured by accident arising out of and in course of his employment, and in the absence of evidence to the contrary this must be taken to be the fact. *Grant v. Glasgow & S. W. R. Co.* [1908] S. C. (Scot.) 187. L.R.A.1916A.

The inference may be drawn that the injury arose out of and in the course of the employment, where a night workman in a colliery went to his home one morning at the regular time, with a broken finger, and there was nothing to suggest that the accident happened on his way home. *Mitchell v. Glamorgan Coal Co.* (1907) 23 Times L. R. (Eng.) 588.

An accident arising out of and in the course of the employment may be inferred where a bricklayer returned home from work one night, with a sore on the back of the thumb of his hand, and there is evidence that such was a common occurrence with a bricklayer. *Fleet v. Johnson* [1913] W. C. & Ins. Rep. (Eng.) 149, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60.

In *Lovelady v. Berrie* (1909) 2 B. W. C. C. (Eng.) 62, a good, healthy and steady workman was employed to pick up cotton waste about the decks of a ship, and during the employment was sent to work in a hold. After two hours he came up the ladder of the hold, apparently in great pain, and the foreman sent him home. Upon examination there appeared slight marks upon his ribs. After three days pneumonia developed, attributable by the attending doctor to the injury to his sides, which culminated about a week thereafter in his death. The court of appeal held that the death was caused by accident arising out of and in the course of his employment, although how he received the injury was unknown, or at least is not revealed in the report of the case.

Where a puddler in an iron works left the door of his furnace to go to the blacksmith shop, which was five minutes' walk distant, the route being well lighted and lying along the bank of a canal, and he was found drowned the next day in the canal, the county court judge may find that he came to his death by accident arising out of and in the course of his employment, although there is no direct evidence as to how he came to be in the canal. *Furnivall v. Johnson's Iron & Steel Co.* (1911) 5 B. W. C. C. (Eng.) 43.

Where a gardener was injured while at work in the garden by a nail passing through his boot and piercing the large toe, and died from tetanus, which subsequently set in, it was held that he died from accident arising out of and in the course of his employment, where it was shown that persons working in stables and gardens are peculiarly subject to contract the disease of tetanus if suffering from any wound or cut, but it was not shown that he might not have contracted the disease elsewhere. *Walker v. Mullins* (1908) 42 Ir. Law Times, 168, 1 B. W. C. C. 211.

A county court judge may find that death resulted from injury by accident arising out of and in the course of the employment, although the only admissible evidence of the fact of the accident consisted of a notice of accident the workman sent to the employer, and the payment, two days before his death,



*a. Disabled "from earning full wages"*  
(§ 1, subsec. 2 (a)).

A workman whose work consisted partly of superintendence and partly of the adjustment of certain machines was held to have been disabled "for a period of at least two weeks" from "earning full wages at the work at which he was employed," within the meaning of this subsection, where, although it was shown that after the accident he continued to work for the same employer at the same wages, it was also proved that he was unable to attend to the adjustment of machines; that he could do no work except that of superintendence; and that he would have been unable to earn the same wages if he had had to take service under another employer; and it is immaterial that as a matter of grace, the employer paid full wages all of the time, so that in fact the workman lost no part of his wages.<sup>71</sup>

*e. Alternative remedies open to workman or dependents* (§ 1, subsec. 2 (b)).

As to election to come under the American statutes, see post, 219.

As to exclusiveness of remedy fur-

nished by the American statutes, see post, 223.

The provision of the act which gives the workman or his dependents the option of taking proceedings independently of the act in case the injury is caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, has been held not to prevent the workman from maintaining a common-law action, after it had been determined that his case was not one which came within the purview of the act;<sup>72</sup> as where the workman had not been in the employment for a period of time sufficiently long to entitle him to compensation,<sup>73</sup> or where the claimant was not a "dependent" within the meaning of the act,<sup>74</sup> or where the claimant was only partially dependent upon the workman and there were others who were wholly dependent upon him.<sup>75</sup> And it has been held not to prevent a workman from withdrawing a claim made under the act, before there has been any decision upon it.<sup>76</sup> Where however, compensation has been refused upon the merits of the case, the workman is then not entitled to bring an action independently of the statute.<sup>77</sup>

But the broad view was later taken by

of a sum as compensation money to his wife, who called for it. *Harley v. Walsall Wood Colliery Co.* [1915] W. C. & Ins. Rep. (Eng.) 9, 8 B. W. C. C. 86.

<sup>71</sup> *Chandler v. Smith* [1899] 2 Q. B. (Eng.) 506, 68 L. J. Q. B. N. S. 909, 81 L. T. N. S. 317, 47 Week. Rep. 677, 15 Times L. R. 480, followed in *Freeland v. Macfarlane* (1900) 2 Sc. Sess. Cas. 5th series, 832, 37 Scot. L. R. 599, 7 Scot. L. T. 456; *Great North of Scotland R. Co. v. Fraser* (1900) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

<sup>72</sup> An injured employee who has accepted a certain sum of money as compensation under the act is not debarred thereby from recovering at common law, where he has no cause of action under the act. *Harris v. Ford* (1909) 28 New Zealand L. R. 426.

<sup>73</sup> *Beckley v. Scott* [1902] 2 L. R. (Ir.) 504 (workman held not to be precluded from maintaining action at common law after it had been determined that his case was not one within the act because he had not been employed two weeks).

<sup>74</sup> A claimant who has been refused compensation on the ground that she was not a "dependent" of the deceased workman is not thereby barred from raising an action of reparation at common law, or under the employers' liability act 1880, against the deceased's employer. *McDonald v. Dunlop* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 533.

<sup>75</sup> A son who had claimed compensation under the act on account of the death of L.R.A.1916A.

his father, but was found to have no title to insist on the claim, because he had been only partially dependent on his father, while there were others who had been wholly dependent on the father, is not, by reason of his unsuccessful claim, barred from insisting on an action for damages on account of the death of his father. *Blain v. Greenock Foundry Co.* (1903) 5 Sc. Sess. Cas. 5th series, 893, 40 Scot. L. R. 639, 11 Scot. L. T. 92.

<sup>76</sup> *Rouse v. Dixon* [1904] 2 K. B. (Eng.) 628, 73 L. J. K. B. N. S. 662, 68 J. P. 407, 91 L. T. N. S. 436, 20 Times L. R. 553, 53 Week. Rep. 237. In this case the building upon which the workman was at work was not of sufficient height to entitle him to compensation.

<sup>77</sup> A workman who has claimed compensation under the act, and whose claim has been disallowed by the arbitrator on the ground of his serious and wilful misconduct, must be held to have exercised the option given to him, and he is not entitled thereafter to bring an action for damages at common law. *Burton v. Chapel Coal Co.* [1909] S. C. (Scot.) 430. Lord McLaren said: "Upon an equitable view of the meaning of the proviso, it has been held that if the claimant has not a title to claim compensation, because he is not within the class of persons who are described as dependents, his failure to show a title does not preclude him from setting up his claim at common law. In such a case there is no real option, because the party has only one claim. The

the court of appeal, that if a workman takes proceedings under the workmen's compensation act or commences an action either at common law or under the employers' liability act, he has exercised his option regardless of the outcome of such proceedings, the only exception being that provided for in § 1, subsec. 4.<sup>78</sup>

An election under the act is shown by proof that the workman accepted pay-

ments for a considerable period of time.<sup>79</sup> But an alleged election may be disproved by showing that, although the workman had accepted payment, he was excusably ignorant of the effect of his act, particularly if there were anything like misrepresentation made by the employer in order to secure the acceptance by the workman of the payment.<sup>80</sup>

An interesting question has arisen in

case is therefore not within the proviso we are considering, which presupposes two claims, one of which is to be heard and determined. But in the present case the claim under the compensation act was tried and decided against the claimant on its merits, and he is now attempting to follow out, by action at law, the alternative claim, which is founded on the alleged fault of the employer. This proceeding, as I think, is contrary to the letter, and the spirit of the statutory provision against double liability."

<sup>78</sup> *Cribb v. Kynoch* [1908] 2 K. B. (Eng.) 551, 77 L. J. K. B. N. S. 1001, 99 L. T. N. S. 216, 24 Times L. R. 736, 52 Sol. Jo. 581. *Beckley v. Scott (Ir.)* and *Rouse v. Dixon (Eng.)* supra, were disapproved. It is to be noted, however, that the actual decision in this case was that a workman could not give the required notice in due time, and have it serve as a foundation for future proceedings in the event that an action at law commenced more than six months after the injury should prove unsuccessful.

<sup>79</sup> Where it appeared that at the end of the week in which he was injured a workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but after that he would be paid half wages, and subsequently, for a period of about six months, received each week a sum amounting to slightly more than half his average weekly wage, it was held that, notwithstanding there was no written agreement and no receipt was given, the pursuer had elected to accept, and had accepted, compensation under the workmen's compensation act, and was therefore barred from bringing an action at common law. *Mackey v. Rosie* [1908] S. C. 174, 45 Scot. L. R. 178, 1 B. W. C. C. 52. The lord ordinary pointed out that the workman was not a foreigner nor an illiterate person and was not in such a condition as the result of the accident that he could claim not to be responsible for his acts.

An election to take under the act is evidenced by receipts for weekly payments, some of which were worded, "in full satisfaction of amount due to me under the act." *Little v. MacLellen* (1900) 2 Sc. Sess. Cas. 5th series, 387, 37 Scot. L. R. 287, 7 Scot. L. T. 313.

Weekly payments of half wages continued for over six months will be held satisfaction of any claim for compensation although the receipts which the workman gave were headed with the words "compassionate allowances." *Ferriter v. Port of L.R.A.1916A.*

*London Authority* [1913] W. C. & Ins. Rep. (Eng.) 455, 6 B. W. C. C. 732.

<sup>80</sup> In *Fowler v. Hughes* (1903) 5 Sc. Sess. Cas. 5th series, 394, 40 Scot. L. R. 321, 10 Scot. L. T. 583, the court held that a receipt for 12 s. 6 d. for injuries due to the loss of an eye, secured by an agent of the employer while the injured employee was lying in bed in great suffering, and without giving him any explanation, and without reading it over to him, could not be considered as an agreement by him to take his compensation under the act.

The signing of a receipt which purports to be a "final discharge" does not bar the workman's claim to compensation as long as he is incapacitated, where the workman was ignorant of what the paper contained, and it was without consideration. *Macandrew v. Gilhooley* [1911] S. C. 448, 48 Scot. L. R. 511, 4 B. W. C. C. 370.

A workman cannot be said to have elected to take compensation under the act because he had applied for money for his injuries, and accepted two sums consisting of the amount due him under the act, and had with his mark authenticated two receipts therefor, and knew of his right to half wages during incapacity, where it appears that he was imperfectly acquainted with the English language, and unable to read or write it, and did not know of the act by name, or of his rights apart from the act, and the receipts were not read over or explained to him. *Valenti v. Dixon* [1906-07] S. C. (Scot.) 695.

While a release or an agreement to accept a lump sum in full satisfaction of all claims is not prohibited by the act, a receipt for the amount to which an injured workman is entitled under the act, although expressed to be in full satisfaction and liquidation of any claim he had or might have in respect to the accident, does not amount to a release, being without consideration. *Great Fingall v. Sheehan* (1906) 3 Austr. L. R. 176.

It is for the jury to say whether an injured workman understood the nature of several receipts which he signed, acknowledging the receipt of compensation under the act, where he subsequently returned the money, and claimed that he did not understand the nature of the receipts. *Huckle v. London County Council* (1910) 27 Times L. R. (Eng.) 112, 4 B. W. C. C. 113.

A workman cannot be held to have taken proceedings independently of the act, where he signed a receipt in full of claims "under the employers' liability act of 1880" where



a few cases as to whether some of the dependents in a case in which the workman has been killed under circumstances which render the employer liable at common law, or under the employers' liability act, may, by taking proceedings to secure compensation, prevent other dependents from bringing in an action to recover damages, but in these cases the facts are such that the court has not had to pass upon the question.<sup>81</sup> Thus, a widow, who, although not a party to the proceedings for compensation, attends the hearing and renounces her right and interests in the award to be made, cannot subsequently bring an action for damages.<sup>82</sup> The decision of the court of appeal was put upon the ground that the award had been made with the widow's knowledge and consent.<sup>83</sup> In another case the widow re-

he claimed compensation under the act of 1906, and no previous mention of employers' liability act had been made, and as a matter of fact the employer had not paid the workman the full amount mentioned in the receipt. *Hawkes v. Coles* (1910) 3 B. W. C. C. (Eng.) 163.

<sup>81</sup> In *Codling v. Mowlem* (1914) 7 B. W. C. C. (Eng.) 786, Buckley, L. J., in discussing the provision of § 1 (2) (b), as to the privilege given to dependent, to proceedings either under the act or independently of the act, said: "I quite recognize, as has been suggested in the course of the argument in this case, that many very difficult questions may arise under that provision. For instance, if you have, as here, seven dependents, what is meant by 'may at their option'? Does that mean that they must be unanimous in their option, or if four of them take one view, and three take the other, is the voice of the majority to prevail, or has each one of the dependents individually an option? Inasmuch as the option is to do either one thing or another thing, you cannot, of course, have an option exercised in one way which does not exclude the other; and if three of them take the former course, and four take the latter, there is no option really of the dependents as a body at all. Those are difficulties which will have to be faced when they arise."

<sup>82</sup> *Codling v. Mowlem* (Div. Ct.) [1914] 2 K. B. (Eng.) 61, 83 L. J. K. B. N. S. 445, 108 L. T. N. S. 1033, 29 Times L. R. 619, [1914] W. C. & Ins. Rep. 1, 6 B. W. C. C. 766, affirmed by the court of appeal in [1914] 3 K. B. (Eng.) 1055, 111 L. T. N. S. 1086, 83 L. J. K. B. N. S. 1727, 30 Times L. R. 677, 58 Sol. Jo. 783, [1914] W. N. 333, 7 B. W. C. C. 786.

<sup>83</sup> In the divisional court *Atkin, J.*, had said: "The employer has been made liable to pay, and has in fact paid, compensation for injury to a workman by an accident arising out of and in the course of his em-

nounced her interest in the arbitration, intending to bring suit under Lord Campbell's act; and upon the award being made, it was simply held that the dependents, who claimed the award, were entitled to all of it, and that the portion which would have gone to the widow had she joined in the award did not go back to the employers.<sup>84</sup>

An option exercised in behalf of minors to accept benefits under the act is not a bar to a subsequent action for damages, if the option is not for the benefit of the minor.<sup>85</sup> But where litigation duly commenced in the name of the infant by a next friend has been prosecuted to judgment, he is as much bound by the proceedings as if he were an adult, and will be held to have exercised his option.<sup>86</sup>

The personal representatives of a ployment under the workmen's compensation act by an award duly made. It seems to me immaterial whether such liability was imposed and payment made with the knowledge and consent of the plaintiff or not, but in this case the plaintiff both knew and consented. I think that the employers are, by the terms of the act, not liable also to pay compensation for such injury independently of the act, and the plaintiff in this action seeks to impose such a liability. I therefore decide the point of law mentioned in the order in favour of the defendants, the employers, who must have the costs of the hearing before me in any event." The court of appeal, however, differed from *Atkin, J.*, in his statement that it was immaterial whether such payment had been made with the knowledge or consent of the plaintiff or not; it was stated by that court that if the payment had been made without her knowledge and without her consent, a very different question would have arisen, but that it appeared that the plaintiff both knew and consented to the payment.

<sup>84</sup> *Gill v. Fortescue* [1913] W. C. & Ins. Rep. (Eng.) 471, 6 B. W. C. C. 577.

<sup>85</sup> *Stephens v. Dudbridge Ironworks Co.* [1904] 2 K. B. (Eng.) 225, 73 L. J. K. B. N. S. 739, 68 J. P. 437, 52 Week. Rep. 644, 90 L. T. N. S. 838, 20 Times L. R. 492, 6 B. W. C. C. 48.

The acceptance in behalf of a minor fourteen years of age of compensation at one half the amount of her wages will not preclude her from maintaining an action for damages against the employer if the arrangement does not appear to be for her benefit. *Ford v. Wren* (1903; common-law action) 115 L. T. Jo. (Eng.) 357, 5 W. C. C. 48.

<sup>86</sup> *Cribb v. Kynoch* [1908] 2 K. B. (Eng.) 551, 77 L. J. K. B. N. S. 1001, 99 L. T. N. S. 216, 24 Times L. R. 736, 52 Sol. Jo. 581, 1 B. W. C. C. 43.

workman who had accepted a scheme certified by the registrar of a friendly society under § 3, subsec. 1 of the act, cannot take advantage of the rights which they otherwise would have had under the common law or the employers' liability act. The workman had exercised the option provided for in § 1, subsec. 2 (b).<sup>87</sup>

A workman who, upon the suspension of payments made under the act, commences a common-law action for his injuries, will be held to have acquiesced in the suspension of payments under the act during the continuance of the action, and is barred from thereafter claiming compensation for such time.<sup>88</sup>

A workman receiving full compensation in respect to an injury causing incapacity is estopped from claiming wages during the period for which he received compensation.<sup>89</sup>

See also the cases construing subsec. 4 of § 1, relative to the recovery of compensation in cases where nonliability apart from the statute has been established. Post, 81.

<sup>87</sup> Taylor v. Hamstead Colliery Co. [1904] 1 K. B. (Eng.) 838, 73 L. J. K. B. N. S. 469, 68 J. P. 300, 52 Week. Rep. 417, 90 L. T. N. S. 363, 20 Times L. R. 338.

<sup>88</sup> Rosie v. MacKay [1909-10] S. C. 714, 46 Scot. L. R. 999.

<sup>89</sup> Elliott v. Liggins [1902] 2 K. B. (Eng.) 84, 71 L. J. K. B. N. S. 483, 50 Week. Rep. 524, 87 L. T. N. S. 29, 18 Times L. R. 514.

<sup>90</sup> Cotton, L. J., in Lewis v. Great Western R. Co. (1877) L. R. 3 Q. B. Div. (Eng.) 195, 47 L. J. Q. B. N. S. 131, 37 L. T. N. S. 774, 26 Week. Rep. 255. The language used by the other lords justices is to a similar effect.

<sup>91</sup> Lord McLaren in Praties v. Broxburn Oil Co. [1906-07] S. C. (Scot.) 581.

<sup>92</sup> Johnson v. Marshall [1906] A. C. (Eng.) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630, 8 W. C. C. 10.

In Wallace v. Glenboig Fire Clay Co. [1907] S. C. (Scot.) 967, as cited in 2 Mew's Dig. Supp. 1547, it was held that the act must be wilful and also serious—that is, not doubtful or trivial in quality.

<sup>93</sup> Johnson v. Marshall (Eng.) supra.

Serious misconduct means misconduct which in itself is serious, and not serious only when looked at in the light of the actual consequences of it. Hill v. Granby Consol. Mines (1905) 12 B. C. 118.

Compensation will not be refused on the ground of serious and wilful misconduct on the part of a workman who was injured while walking along a tramway in a mine upon which he knew trams were approaching, where the injury was caused by the L.R.A.1916A.

*f. "Serious and wilful misconduct" of workman (§ 1, subsec. 2 (c)).*

As to the effect of serious and wilful misconduct of employee, under the American statutes, see post, 243.

The phrase "serious and wilful misconduct" implies, apparently, something nearly, if not quite, the same as that "wilful misconduct" which was explained by the court of appeals in a case involving the liability of a carrier for damage to goods. "There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning, or without care, regardless whether it will or will not cause injury."<sup>90</sup> It has been said that misconduct is not "serious and wilful" unless moral blame attaches to it,<sup>91</sup> and that the word "serious" imports deliberateness, not merely thoughtlessness.<sup>92</sup> The act itself must be serious and not merely the consequences thereof.<sup>93</sup>

The question whether the servant is or is not debarred from recovery on the ground of "serious and wilful miscon-

duct" is a question of fact. In the case of rope slipping, and there was no evidence that he could not have reached a manhole before the tram reached him. Rees v. Powell Duffryn Steam Coal Co. (1900) 64 J. P. (Eng.) 164.

Nor where an engineer, after leaving his engine, walked along the track to a station where he had to report himself off duty. Todd v. Caledonian R. Co. (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Scot. L. R. 784, 7 Scot. L. T. 85.

Nor where a watchman, stationed at a certain point to warn approaching trains of a landslide, went along the line for about 300 yards. Glasgow & S. W. R. Co. v. Laidlaw (1900) 2 Sc. Sess. Cas. 5th series, 708, 37 Scot. L. R. 503, 7 Scot. L. T. 420.

But a miner's injury must be held attributable to his own serious and wilful misconduct, where the injury was received while he was attempting to cross two sets of rails in a mine while the hutches were running, with full knowledge that it was dangerous so to do, and the danger could have been avoided by waiting a short time until the hutches had ceased running. Condron v. Paul (1903) 6 Sc. Sess. Cas. 5th series, 29, 41 Scot. L. R. 33, 11 Scot. L. T. 383.

The act of a farm servant who, in driving a lorry, ties the reins to a small wheel which worked a brake on the front of the lorry, instead of keeping them in his hand, thereby causing the horse's head to be pulled round so as to make it run back and upset the lorry, amounts to "serious and wilful misconduct." Vaughan v. Nicoll (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 464.



duet" ceases to be of any importance, when it is apparent from the circumstances that the accident did not arise out of, or in the course of, his employment.<sup>94</sup> But if the workman brings himself within the act by showing that the accident arose out of, and in the course of, his employment, his case can only be met by the employer by showing that the injury to the workman is attributable to his serious and wilful misconduct.<sup>95</sup>

It has been held that a finding in favor of the workman will not be held erroneous as a matter of law because of his violation of rules and orders laid down

by the master,<sup>96</sup> especially if the rule was unknown to the workman,<sup>97</sup> or if it appears that the rule was habitually violated.<sup>98</sup> Ignorance of a rule for the guidance of miners may not amount to serious and wilful misconduct, although the miners had means of knowledge of the rule.<sup>99</sup> But a decision apparently the contrary has been handed down by the Scottish court of sessions, in regard to a statutory rule.<sup>1</sup> Ordinarily, however, the breach of an express rule or order will be held to be serious or wilful misconduct as a matter of fact, especially if such rule or order was made especially

<sup>94</sup> *Lowe v. Pearson* [1899] 1 Q. B. (Eng.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124.

See also cases cited in notes 10 et seq. ante, in which there was a disobedience of orders which might be considered serious and wilful misconduct, but the decisions are based upon the ground that the injury did not arise out of the employment.

<sup>95</sup> *McNicholas v. Dawson* [1899] 1 Q. B. (Eng.) 773, 68 L. J. Q. B. N. S. 470, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242, per Collins, L. J.; *Johnson v. Marshall* [1906] A. C. (Eng.) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630, 8 W. C. C. 10, per Lord Loreburn, L. C.

<sup>96</sup> In *George v. Glasgow Coal Co.* [1909] A. C. (Eng.) 123, 2 B. W. C. C. 125, Lord Loreburn, L. C., said: "In my opinion, it is not the province of a court to lay down that the breach of a rule is *prima facie* evidence of serious and wilful misconduct. That is a question purely of fact, to be determined by the arbitrator as such. The arbitrator must decide for himself and ought not to be fettered by artificial presumptions of fact prescribed by a court of law."

A finding in favor of a servant will not be pronounced erroneous, as a matter of law, where a rule made under the coal mines regulation act of 1887 was violated by a workman employed in a coal mine. *Rumboll v. Nunnery Colliery Co.* (1899) 80 L. T. N. S. (Eng.) 42, 63 J. P. 132.

Nor where a workman instead of using a ladder undertook to ascend by a hoist to a platform for the purpose of obtaining a certain article which he required for his work. *Logue v. Fullerton* (1901) 3 Sc. Sess. Cas. 5th series, 1006, 38 Scot. L. R. 738, 9 Scot. L. T. 152.

Nor where a boy of nineteen, in contravention of an express order, put his hand across a circular saw to pick up an uncut screw which had fallen from its place. *Reeks v. Kynoch* (1901) 18 Times L. R. (Eng.) 34, 50 Week. Rep. 113, 2 N. C. C. A. 877. The court said that the inference was that the element of wilfulness was not present, but that the act was committed on a sudden impulse. L.R.A.1916A.

<sup>97</sup> As where a servant used a hoist to ascend to a platform, in contravention of a prohibitory notice, but the trial judge did not find that he knew of the prohibition. *McArthur v. McQueen* (1901) 3 Sc. Sess. Cas. 5th series, 1010, 38 Scot. L. R. 732, 9 Scot. L. T. 114.

A breach of a rule as to mines, unknown to the servant, where his ignorance is due to mere negligence, is not "serious or wilful misconduct." *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353.

<sup>98</sup> The county court judge may find that a girl fourteen years old employed as a soda water bottler was not guilty of serious and wilful misconduct in neglecting to wear gauntlets which had been furnished by the employer and which by the special rules of the establishment and by special orders given directly to the workmen she was required to use, where the evidence showed that the forewoman had allowed her to disregard the rules but verbally told her to obey them, and had verbally told her to put them on in case the employer should come to see her. *Casey v. Humphries* (1913) 6 B. W. C. C. (Eng.) 520, [1913] W. N. 221, 29 Times L. R. 647, 57 Sol. Jo. 716.

The use by an employee for his own purpose of a lift upon which was a notice that no one was allowed to use the lift except in charge of a load does not amount to serious and wilful misconduct, where other employees had used the lift in like manner and the notice was not intended as a warning against danger and no danger could have been anticipated from the use of the lift by an individual workman. *Johnson v. Marshall* [1906] A. C. (Eng.) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630.

<sup>99</sup> *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353.

<sup>1</sup> Where a workman, except for some dominant reason, is in breach of a duly published statutory rule, and an injury results therefrom, his *de facto* ignorance of the rule can in no circumstances prevent the injury from being attributable to his "serious and wilful" misconduct. *Dobson v.*

for the safety of the employee.<sup>2</sup> Where a workman does a dangerous act contrary

to the express orders of his superior, and is injured, the accident is one intention-

United Collieries (1905) 8 Sc. Sess. Cas. 5th series (Scot.) 241 (miner carrying cart-ridge not in a case, with naked light in his cap).

<sup>2</sup>No recovery was allowed where a girl engaged in passing sheaves on a threshing machine undertook, in disobedience to an express prohibition, to step across the opening through which they were fed to the machine, merely for the purpose of speaking to a friend, and without any necessity arising out of the work. Callaghan v. Maxwell (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Scot. L. R. 313, 7 Scot. L. T. 339.

Nor where a miner infringed a rule forbidding him to carry a naked light on his cap while carrying cartridges not inclosed in a case. Dailly v. Watson (1900) 2 Sc. Sess. Cas. 5th series, 1044, 37 Scot. L. R. 782, 7 Scot. L. T. 73.

Nor where miners contravene a special rule framed under the coal mines regulation act. United Collieries v. McGhie (1904) 6 Sc. Sess. Cas. 5th series, 808, 41 Scot. L. R. 705, 12 Scot. L. T. 650; Lynch v. Baird (1904) 6 Sc. Sess. Cas. 5th series, 271, 41 Scot. L. R. 214, 11 Scot. L. T. 597 (facts, however, did not show contravention).

Nor where a miner violated a rule requiring the erection of props at specified intervals. O'Hara v. Cadzow Coal Co. (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 439. The Lord Justice Clerk said: "The rule is an imperative one, and is plainly meant to insure the safety of the worker, and the failure to carry it out is plainly 'serious misconduct,' as adding greatly to danger. That it was wilful is also plain, for there is no suggestion of an excuse for the disobedience."

Nor where a miner failed to get into a manhole in the main haulage road of the mine, after he had been warned by a fellow workman that a train of cars was approaching. John v. Albion Coal Co. (1901) 18 Times L. R. (Eng.) 27, 65 J. P. 788.

Nor where the servant cleaned machinery in motion, such an act being forbidden by a rule known to him. Guthrie v. Boase Spinning Co. (1901) 3 Sc. Sess. Cas. 5th series, 769, 38 Scot. L. R. 483.

Nor where an engine-driver left the foot plate of the engine while in motion, contrary to rules. Bist v. London & S. W. R. Co. [1907] A. C. (Eng.) 209, 76 L. J. K. B. N. S. 703, 96 L. T. N. S. 750, 23 Times L. R. 471, 8 Ann. Cas. 1; Jones v. London & S. W. R. Co. (1901) 3 W. C. C. (Eng.) 46.

Nor where a workman failed to use a guard to a saw which he had been directed to use by both the foreman and a factory inspector. Brooker v. Warren [1907] 23 Times L. R. (Eng.) 201.

The disobedience by boys of positive directions not to go to a certain dangerous place is "serious and wilful misconduct." Powell v. Lanarkshire Steel Co. (1904) 6 Sc. Sess. Cas. 5th series (Scot.) 1039. L.R.A.1916A.

A deliberate breach of a regulation forbidding the use of a freight elevator to reach another floor, committed by an inexperienced workman after two warnings, is serious and wilful misconduct. Granick v. British Columbia Sugar Ref. Co. (1909) 14 B. C. 251.

The breach of a general rule in a mine and disobedience of the order of a deputy is serious and wilful misconduct. Watson v. Butterley Co. (1902; C. C.) 114 L. T. Jo. (Eng.) 178, 5 W. C. C. 51.

Where a miner after lighting a fuse and retiring to a safe place waits only three minutes before returning to see whether or not the fuse has gone out, instead of the thirty minutes required by the rules of the mine, he is guilty of serious and wilful misconduct which prevents a recovery of compensation. Waddell v. Coltness Iron Co. [1913] W. C. & Ins. Rep. 42, 50 Scot. L. R. 29, 6 B. W. C. C. 306.

A workman employed in a mine, who, despite warnings and in violation of the orders of the manager, rides upon a truck of ore at point where it will travel about 6 miles an hour by gravitation and where the track is curving and only temporary, is guilty of serious and wilful misconduct. Rowe v. Reynolds (1910) 12 West Austr. L. R. 75.

A collier who permits his naked light to remain in such a position that it ignites gunpowder, and thereby commits a breach of a special rule, is guilty of wilful and serious misconduct which precludes a recovery. Donnachie v. United Collieries [1910] S. C. 503, 47 Scot. L. R. 412.

The violation of a rule forbidding the opening of the gate fencing to a shaft before the cage is stopped is "serious and wilful" misconduct. George v. Glasgow Coal Co. [1909] A. C. (Eng.) 123, 78 L. J. P. C. N. S. 47, 99 L. T. N. S. 782, 25 Times L. R. 57 [1909] S. C. (H. L.) 1, 46 Scot. L. R. 28. Lord Loreburn, L. C., and Lord Robertson both expressed the opinion that the violation of a rule was not *prima facie* evidence of "serious and wilful" misconduct.

A charwoman who in hanging out clothes stands upon the ledge of a glass frame, which she has been forbidden to do, is guilty of serious and wilful misconduct. Beale v. Fox (1909; C. C.) 126 L. T. Jo. (Eng.) 257, 2 B. W. C. C. 467.

In Hill v. Granby Consol. Mines (1906) 12 B. C. 118, where a brakeman stood on the platform of a car in such a position that when it entered a shed projecting from the mouth of a tunnel he would inevitably be killed, Duff, J., said: "Any neglect is 'serious neglect' within the meaning of the act, which in the view of reasonable persons, . . . exposes anybody (including the person guilty of it) to the risks of serious injury. . . . The test is the apprehended, as distinguished from the actual, consequences."



ally produced within the meaning of the Quebec act.<sup>3</sup> Intoxication has been held to be serious and wilful misconduct.<sup>4</sup> As to whether injuries by accident received by an employee while he is intoxicated "arise out of and in the course of his employment," see note 47 ante.

The making of a false representation by an infant that he is of full age in order to secure employment is not "serious and wilful misconduct or serious neglect," where it appears that the accident is not solely attributable to the misrepresentation.<sup>5</sup> It is to be noted that under the act of 1906, serious and wilful misconduct is not a bar to compensation where the injury results in death or in serious and permanent disablement.<sup>6</sup> What constitutes serious and permanent disablement has been passed upon in a few cases.<sup>7</sup>

<sup>3</sup> *Jetté v. Grand Trunk R. Co.* (1911) Rap. Jud. Quebec, 40 C. S. 204 (brakeman jumped on a moving train).

<sup>4</sup> Going up a ladder while intoxicated, carrying unnecessarily a large piece of timber and failing to use the hands in the proper and ordinary way for support, is serious and wilful misconduct. *Burrell v. Avis* (1898; C. C.) 106 L. T. Jo. (Eng.) 61, 1 W. C. C. 129.

Being drunk and unfit to work is serious and wilful misconduct. *McGroarty v. Brown* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 809.

<sup>5</sup> *Darnley v. Canadian P. R. Co.* (1908) 14 B. C. 15, 2 B. W. C. C. 505.

<sup>6</sup> "I think that the 'serious and wilful misconduct' section of the act—§ 1, subsec. (2) (c)—really throws great light on the present case. It is not every misconduct that prevents a workman from recovering compensation. It must be proved that the misconduct was 'serious and wilful;' and although the present case does not come under that provision,—because for some reason the section does not apply to a case where the accident results in death,—still the principle that it is not every misconduct which disentitles a workman to the benefit of the act must apply in this case as in every other." *Cozens-Hardy, M. R.*, in *Robertson v. Allan Bros. & Co.* (1908) 1 B. W. C. C. (Eng.) 172.

Serious and wilful misconduct is not material where the workman has been seriously and permanently disabled. *Jackson v. Denton Colliery Co.* [1914] W. C. & Ins. Rep. (Eng.) 91, 110 L. T. N. S. 559, 7 B. W. C. C. 92.

In *Weighill v. South Hetton Coal Co.* [1911] 2 K. B. (Eng.) 757, in discussing the effect of the provision of the act of 1906, which provides that serious and wilful misconduct is not a bar to compensation where the injury results in "death or serious and permanent disablement," *Cozens-Hardy, M. R.*, said: "Serious and wilful misconduct within the sphere of the L.R.A.1916A.

Where the county court judge on the hearing permitted an amendment so as to allow the employer to set up the defense of serious and wilful misconduct, which was not raised by the answer nor in the correspondence between the parties, the workman is entitled to an adjournment in order to call evidence in rebuttal.<sup>8</sup>

The phrase "serious neglect" in § 2, subsec. (c) of the British Columbia act does not refer to the conduct of the workman after the injury.<sup>9</sup>

Under the Quebec act, the compensation recoverable by an injured employee is reducible to the extent that the injuries were caused by the fault of the workman.<sup>10</sup>

Serious and wilful misconduct to prevent a recovery must be the proximate cause of the injury.<sup>11</sup> And the burden

employment does not prevent the workman's dependents from claiming compensation: serious and wilful misconduct outside the sphere of his employment is entirely different. Serious and wilful misconduct outside the sphere of his employment does not bring within the sphere of the employment that which but for the serious and wilful misconduct would be outside of it."

Although a collier in going into a dangerous working in disobedience to the colliery special rules, and against the warnings of a fireman or overlooker, was guilty of "serious and wilful" misconduct, yet if he did so in an honest attempt to further that which he was instructed to effect, his dependents may secure compensation for his death, which resulted from such act. *Harding v. Brynddu Colliery Co.* [1911] 2 K. B. (Eng.) 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269.

<sup>7</sup> A workman who has lost two fingers of his right hand is seriously and permanently disabled, and is entitled to compensation notwithstanding the injury was occasioned by his "serious and wilful" misconduct. *Hopwood v. Olive* (1910) 102 L. T. N. S. (Eng.) 790, 3 B. W. C. C. 357.

The loss of the top joint of the middle finger of the right hand of a machinist may be found to be serious and permanent disablement within the meaning of § 1 (2) (3) of the act. *Brewer v. Smith*, (1913) 6 B. W. C. C. (Eng.) 651.

<sup>8</sup> *Casey v. Humphries* [1913] W. N. (Eng.) 221, 29 Times L. R. 647, 57 Sol. Jo. 716, [1913] W. C. & Ins. Rep. 485, 6 B. W. C. C. 520, 4 N. C. C. A. 881.

<sup>9</sup> *Powell v. Crow's Nest Pass Coal Co.* (1915) 23 D. L. R. (B. C.) 57.

<sup>10</sup> *Croteau v. Victoriaville Furniture Co.* (1911) Rap. Jud. Quebec, 40 C. S. 44.

<sup>11</sup> A breach of a statutory rule as to mines is "serious and wilful misconduct," but such breach is not a bar to recovery, unless it is the cause of the accident. *Pra-*

of proving that the accident was due to the serious and wilful misconduct of the workman is upon the employer.<sup>12</sup> Whether or not a workman is guilty of serious or wilful misconduct is a question of fact.<sup>13</sup>

*g. Arbitration for settlement of disputes (§ 1, subsec. 3).*

Generally as to the powers of an arbit-

trator appointed under this subsection, see post, 177.

In order that this subsection may apply, it must be shown that a question has arisen and that it has not been settled by agreement.<sup>14</sup> Where a question as to the amount or duration of compensation has been settled by agreement, there is no room for arbitration. The workman's proper course is to get a memorandum of

*ties v. Broxburn Oil Co. [1906-07] S. C. (Scot.) 581.*

In order that a breach of a statutory rule as to mines shall amount to "serious and wilful misconduct," it must be shown to have been the cause of the accident. *Allan v. Glenborg Union Fire Clay Co. [1906-07] S. C. (Scot.) 967.*

The death of a miner killed while riding on top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, by the fall of a stone from the roof of the tunnel in which the hutch was running, is not "attributable" to his serious and wilful misconduct. *Glasgow Coal Co. v. Sneddon (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 485.* Lord McLaren observed: "What is included under the word 'attributable?' I think that under that word there must be some causal relation between the misconduct of a workman and the injury which he suffers. . . . It is enough that it is a material cause that in some way contributes to the unfortunate result. Therefore I think that the question to be considered under the word 'attributable' is very much the same as we have to consider in cases at common law where there is fault on the part of employer or his servant, and the meaning is that the injury was either caused solely by the workman's own fault, or was contributed to materially by his act or fault."

<sup>12</sup> *British Columbia Sugar Ref. Co. v. Granick (1910) 44 Can. S. C. 105, affirming 15 B. C. 198.*

<sup>13</sup> *Johnson v. Marshall [1906] A. C. (Eng.) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630, 8 W. C. C. 10; Casey v. Humphries (1913) 6 B. W. C. C. (Eng.) 520, [1913] W. N. 221, 29 Times L. R. 647, 57 Sol. Jo. 716.*

Whether or not a workman is guilty of serious and wilful misconduct is a question of fact, and the court will not interfere with the finding of the arbiter. *Leishmann v. Dixon [1910] S. C. 498, 47 Scot. L. R. 410, 3 B. W. C. C. 560.*

Whether the fact that a farm servant fastened the reins to the breeching, instead of holding them in his hand, in violation of the general turnpike act, amounts to serious and wilful misconduct, is a question of fact, and the finding by the sheriff-substitute that it did not will not be reviewed on appeal. *Mitchell v. Whitton [1906-07] S. C. (Scot.) 1267.*

<sup>14</sup> *Field v. Longden [1902] 1 K. B. (Eng.) 47, 71 L. J. K. B. N. S. 120, 66 J. P. 291, L.R.A.1916A.*

*50 Week. Rep. 212, 85 L. T. N. S. 571, 18 Times L. R. 65.* There a workman, having been incapacitated for work by an accident arising out of, and in the course of, his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in schedule L., § 1 (b) (see subtitle B. post), and promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbitration in the county court, and the county court judge made an award for compensation in his favor. It was held, that, under the subsection it was a condition precedent to the jurisdiction of the county court judge that a question should have arisen as to the liability to pay, or as to the amount or duration of compensation under the act, and that, no such question having arisen, the county court judge had no jurisdiction to make an award.

The petition for arbitration is incompetent where, at the date when the petition was presented, no dispute had arisen between the parties as to compensation, and the compensation was not in arrears. *Caledon Shipbuilding & Engineering Co. v. Kennedy (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 960.*

There is no dispute so as to give the county court power to award costs where the employers, not knowing that the injured workman was a minor, paid him only a portion of the compensation to which he as a minor was entitled, but eight days after receiving notice of that fact and a demand for the balance tendered such balance, which was refused because certain alleged costs were not tendered. *Smith v. Abbey Park Steam Laundry Co. (1909) 2 B. W. C. C. (Eng.) 142.*

A petition for arbitration is incompetent where, at the date when the petition was presented, no question had arisen between the parties as to the duration of the compensation; and the mere fact that there was no agreement between the parties capable of registration does not show that a question had arisen between them, so as to entitle the workman to present a petition for arbitration. *Gourlay Bros. v. Sweeney (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 965.*

The refusal of the employer, who had been voluntarily paying compensation to a workman, to sign an agreement, does not give the county court judge jurisdiction to make an award, since it does not pre-



agreement recorded.<sup>15</sup> An implied agreement is sufficient to take away the jurisdiction of the arbitrator.<sup>16</sup> The dispute to be settled by the arbitrator may be as to the liability to pay compensation,<sup>17</sup> as to the amount of compensation payable,<sup>18</sup> or as to the duration of the incapacity.<sup>19</sup> The dispute must exist at the present time; if the employer is paying full compensation there is no ques-

tion for arbitration, although some dispute may arise in the future.<sup>20</sup>

An appeal from a decision of the county court judge dismissing an application for arbitration upon the ground that no question has arisen cannot be sustained upon the ground that the correspondence between the parties showed that a difference had arisen which was not raised

sent a question as to the liability to pay compensation, or as to the amount of duration of compensation. *Mercer v. Hilton* (1909) 3 B. W. C. C. (Eng.) 6.

<sup>15</sup> *Dunlop v. Rankin* (1901) 4 Sc. Sess. Cas. 5th series, 203, 39 Scot. L. R. 146. See also *Cochrane v. Traill* (Ct. of Sess.) 2 F. (Scot.) 794, as cited in 2 *Mew's Dig. Supp.* 1576.

<sup>16</sup> Where there is an implied agreement between the parties, there is no jurisdiction for an arbitrator. *Jones v. Great Central R. Co.* (1901) 4 W. C. C. (Eng.) 23; *Webster v. London & N. W. R. Co.* (1901; C. C.) 3 W. C. C. (Eng.) 52; *Busby v. Richardson* (1901; C. C.) 3 W. C. C. (Eng.) 54; *Trenear v. Wells* (1900; C. C.) 3 W. C. C. (Eng.) 58.

<sup>17</sup> In *Barron v. Carmichael* (1912) 5 B. W. C. C. (Eng.) 436, *Buckley, L. J.*, said: "Jurisdiction under the act arises only if a question arises upon some one of three subject-matters: firstly, liability to pay compensation; secondly, amount of compensation; and, thirdly, duration of compensation."

<sup>18</sup> The county court judge has jurisdiction where the correspondence between the parties shows that although the employer agreed that the workman was entitled to compensation, they could not agree upon the amount thereof. *Brooks v. Knowles* (1911) 5 B. W. C. C. (Eng.) 15.

Where the applicant filed an application for compensation at 12s. 6d., the employer admitting liability and present total incapacity and submitting to an award of 10s. per week during total disability, the amount payable during partial incapacity to be settled thereafter, there was a dispute at the time of application so as to give the county court judge jurisdiction, although the workman had before the hearing agreed to accept 10s. compensation but objected to the limitation to total incapacity. *Higgins v. Poulson* (1911) 5 B. W. C. C. (Eng.) 66.

<sup>19</sup> Arbitration is competent although the employers admitted liability under the act and there was no dispute as to the compensation, but the employers insisted that the workman sign a receipt which provided that the payment admitted liability only for compensation to date of payment, and further liability, if any, was to be determined week by week. *Summerlee Iron Co. v. Freeland* [1913] A. C. (Eng.) 221, 82 L. J. P. C. N. S. 102, 108 L. T. N. S. 465, 29 Times L. R. 277, 57 Sol. Jo. 281, [1913] W. N. 34, [1913] W. C. & Ins. Rep. 302, L.R.A.1916A.

6 B. W. C. C. 255, [1913] S. C. (H. L.) 3.

Where the employer raises the question of duration of incapacity by his answer, he cannot be heard to say that there was no dispute at the time of the application. *Barron v. Carmichael* (1912) 5 B. W. C. C. (Eng.) 436.

An application for arbitration is competent where, although the employers were paying full compensation and had made no threat to stop payment, they had barred the recording of a memorandum of agreement by a receipt signed by the applicant which provided that the payment should continue only while the employers were of the opinion that the incapacity continued. *Brown v. Hunter* (1912) 49 Scot. L. R. 695, 5 B. W. C. C. 589.

A question has arisen for arbitration under § 1 (3) of the act where the employer, although admitting liability to pay compensation during total incapacity, refuses to admit liability to pay compensation in event of partial incapacity and the workman declines to accept an admission limited to total incapacity only. *Cooper v. Wales* (1915) 31 Times L. R. (Eng.) 506.

<sup>20</sup> Where the employer was paying full compensation, the workman was not entitled to arbitration merely because a question might thereafter arise as to whether the compensation which was being made may or may not have to be reviewed in accordance with condition of health and other circumstances affecting the workman. *Payne v. Fortescue* [1912] 3 K. B. (Eng.) 346, 81 L. J. K. B. N. S. 1191, 107 L. T. N. S. 136, 57 Sol. Jo. 81, [1912] W. N. 216, 5 B. W. C. C. 634.

No question for arbitration has arisen where the employers have admitted liability and paid full compensation up to the day of the application for arbitration, although the employers refused to agree to pay compensation during partial incapacity. *Bedwell v. London Electric R. Co.* (1914) 7 B. W. C. C. (Eng.) 685.

There is no question for arbitration where incapacity and liability are admitted and full compensation being paid, although the employer refused to make any agreement as to payment after total incapacity had ceased, but was willing to sign an agreement that the amount of compensation payable during partial incapacity was to be settled afterward. *Sampson v. General Steam Nav. Co.* [1914] W. C. & Ins. Rep. (Eng.) 36, 7 B. W. C. C. 107.

when the request for arbitration was filed.<sup>21</sup>

Section 1, subsec. 3, with reference to arbitration, refers only to questions between the undertaker and the workman; the right of indemnity given by § 4 in favor of the undertaker against a third person who would have been liable but for the provisions of § 4 may be enforced in the high court.<sup>22</sup>

***h. Recovery of compensation where action for damages has failed (§ 1, subsec. 4).***

The cases construing the provision relative to the alternative remedies open to an injured workman may be read with profit in connection with the cases construing this subsection. See ante, 72.

As to election to come under the American statutes, see post, 219.

As to exclusiveness of remedy furnished by American statutes, see post, 223.

This subsection is applicable where it is found that no cause of action at common law and under the act of 1880 was stated by the averments of the com-

plaint.<sup>23</sup> Where a workman who has failed in an action to recover damages is desirous of having compensation for his injury assessed under the act, he must follow the procedure prescribed by this subsection, and must apply, then and there, to the judge trying the action, for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the act.<sup>24</sup> If a workman fails in an action to recover damages for the injury, the trial court is the proper tribunal to assess compensation.<sup>25</sup> And it is only when the action at law is commenced within six months after the injury that compensation may be awarded upon the failure of the law action.<sup>26</sup>

A workman who brings an action at common law and recovers a judgment in the trial court is not barred from subsequently applying for compensation upon his judgment being reversed by a higher court, because he did not apply at the trial court for the assessment of compensation.<sup>27</sup> And the fact that a workman whose action under the employers' liability act has been wrongfully dismissed

<sup>21</sup> *Wooder v. Lush* [1914] 7 B. W. C. C. (Eng.) 673.

<sup>22</sup> *Evans v. Cook* [1905] 1 K. B. (Eng.) 53, 74 L. J. K. B. N. S. 95, 92 L. T. N. S. 43, 21 Times L. R. 42, 56 Week. Rep. 81.

<sup>23</sup> *Henderson v. Glasgow* (1900) 2 Sc. Sess. Cas. 5th series, 1127, 37 Scot. L. R. 857, 8 Scot. L. T. 118.

In *Ivenhoe Gold Corp. v. Symonds* (1907) 4 Austr. C. L. R. 642, it was held that the section was applicable to all cases in which the plaintiff's action failed provided he was otherwise entitled to recover under the statute and consequently applied to a case where the successful defense was a confession and avoidance.

<sup>24</sup> By bringing an action at common law or under the employers' liability act of 1880 a workman exercises his option and the matter is at an end unless he has expressly brought himself within the provisions of § 1, subsec. 4; he cannot after having failed in his law action launch proceedings under the compensation act in respect to the same injuries. *Edwards v. Godfrey* [1899] 2 Q. B. (Eng.) 333, 68 L. J. Q. B. N. S. 666, 80 L. T. N. S. 672, 15 Times L. R. 365, 47 Week. Rep. 551.

See also *Quinn v. Brown* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 855; *McGowan v. Smith* [1906-07] S. C. (Scot.) 548.

<sup>25</sup> *Greenwood v. Greenwood* (1907; Div. Ct.) 97 L. T. N. S. (Eng.) 771, 24 Times L. R. 24, 1 B. W. C. C. 247.

Where a workman has failed in an action at law to recover damages on the ground that the master was not guilty of negligence, the trial court is the only court in which compensation may be assessed. L.R.A.1916A.

*McCormick v. Kelliher Lumber Co.* (1912) 17 B. C. 422, 6 B. W. C. C. 947.

Upon the failure of an action under the employer's liability act of 1880, for an injury compensation for which has been assessed under the compensation act, the court before whom the action was tried has power to deal with the costs of the action including the proceedings for the assessment of compensation. *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. (Eng.) 204, 50 Week. Rep. 129, 85 L. T. N. S. 513, 18 Times L. R. 102, 71 L. J. K. B. N. S. 173, 66 J. P. 4.

<sup>26</sup> *Cribb v. Kynoch* [1908] 2 K. B. (Eng.) 551, 77 L. J. K. B. N. S. 1004, 99 L. T. N. S. 216, 24 Times L. R. 736, 52 Sol. Jo. 581, 1 B. W. C. C. 43.

An application for the assessment of compensation after an unsuccessful action for damages against the employer is incompetent where the action was not raised within six months after the accident. *Durkin v. Distillers Co.* [1914; L. O.] W. C. & Ins. Rep. (Eng.) 28, as cited in *Law Reports Current Dig.* 1914, col. 808.

<sup>27</sup> *McCormick v. Kelliher Lumber Co.* (1913; B. C.) 7 B. W. C. C. 1025. The court said: "Here the judgment at common law was in favor of the plaintiff; and although the judgment was reversed by this court, the effect of that, as I view it, would be to place the parties back in the position they would have been in at the trial if the trial judge had given the judgment which this court held should have been given. The plaintiff would then have been in a position to ask for an assessment of compensation."



applies for an assessment of compensation under the act does not estop him from prosecuting an appeal from the order dismissing the action.<sup>28</sup> If, however, the claim has ripened into an award of compensation, the workman is estopped from proceeding further in the action.<sup>29</sup> It was argued in this case that as the workman was an infant he was not bound by the award, and that the court should proceed upon the assumption that the option had not been exercised for the benefit of the infant, but it was held that the court had no jurisdiction to inquire into that question, and it must treat the award as valid since no steps had been taken to impeach it. No mention is made of a former decision of the same court, where it was held that the compensation act by including apprentices in the general word "workmen" did not in any respect alter the law applicable to contracts made by infants, and consequently the fact that an infant who had been injured made a claim under the compensation act, and the employers had agreed to pay him, and he had received from them the maximum amount payable under the act dur-

ing his incapacity, did not preclude him from thereafter bringing an action against the employers for negligence.<sup>30</sup> A request for assessment of compensation made on a motion to apply the verdict in favor of the defenders in an action brought independently of the act, is in time.<sup>31</sup>

An action under Lord Campbell's act is an action "where injury caused by any accident" within the meaning of § 1, subsec. 4 of the act.<sup>32</sup>

Where a workman has brought an action at common law or under the employers' liability act of 1880 and failed in such action, and has subsequently applied for compensation, it is generally held that whether or not costs should be awarded because of the action at common law or under the employers' liability act is discretionary with the court.<sup>33</sup> The costs where compensation is awarded after the bringing of an unsuccessful action at law for damages are such as would have been incurred had the plaintiff limited himself to proceedings under the act less the extra costs occasioned to the defendant by reason of plaintiff's proceeding originally by action.<sup>34</sup>

<sup>28</sup> *Isaacson v. New Grand (Clapham Junction)* [1903] 1 K. B. (Eng.) 539, 72 L. J. K. B. N. S. 227, 88 L. T. N. S. 291, 19 Times L. R. 150. It was pointed out that the phrase "the action shall be dismissed" could not have reference to an erroneous decision of the county court judge.

<sup>29</sup> *Neale v. Electric & Ordinance Accessories Co.* [1906] 2 K. B. (Eng.) 558, 75 L. J. K. B. N. S. 974, 95 L. T. N. S. 592, 22 Times L. R. 732.

<sup>30</sup> *Stephens v. Dudbridge Ironworks Co.* [1904] 2 K. B. (Eng.) 225, 73 L. J. K. B. N. S. 739, 68 J. P. 437, 52 Week. Rep. 644, 90 L. T. N. S. 838, 20 Times L. R. 492.

<sup>31</sup> *Slavin v. Train* (1911; Ct. Sess.) 49 Scot. L. R. 93, [1912] W. C. Rep. 167, 5 B. W. C. C. 525.

<sup>32</sup> *Potter v. Welch* [1914] 3 K. B. (Eng.) 1020, 30 Times L. R. 644, [1914] W. N. 106, 317, 137 L. T. Jo. 290, 83 L. J. K. B. N. S. 1852, 7 B. W. C. C. 738.

<sup>33</sup> It is discretionary with the court whether the expenses of an unsuccessful trial in an action for damages are to be deducted from a subsequent award of compensation. *McKenna v. United Collieries* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 969.

Costs may be allowed when compensation is awarded under the act after an action independent of it has failed. *Wilson v. Kelly* (1909) 14 B. C. 436.

The costs of bringing a common-law action, in which the jury found for the defendants, may be deducted from the amount awarded the workman under the act. *Cohen v. Seabrook Bros.* (1908; Div. Ct.) 25 Times L. R. (Eng.) 176.  
L.R.A.1916A.

In *Black v. Fife Coal Co.* (1909) S. C. 152, 46 Scot. L. R. 191, it was held that where an action had been brought for the death of a miner against his employers at common law and alternatively for a certain sum under the employers' liability act, and the defenders denied liability but tendered the amount claimed as the amount to which the pursuers were entitled under the compensation act, and upon the tender being refused the defenders were assized at common law and found liable under the employers' liability act in the sum tendered, the pursuers were liable in expenses. This decision, however, was reversed by the House of Lords, which held that the pursuer was entitled to the costs. 5 B. W. C. C. (Eng.) 217.

A workman was not entitled to costs where he brought an action under the employers' liability act of 1880 when such action was dismissed and an award of compensation made under § 1, subsec. 4 of the compensation act, and it appeared that all of the costs, with one immaterial exception, had been incurred because of the bringing of the action under the employers' liability act. *Skeggs v. Keen* (1899) 1 W. C. C. (Eng.) 35.

The employers are entitled to deduct from an award of compensation the amount of costs which they recovered in an action for damages for the same injuries, which action had failed. *Ferguson v. Brick & Supplies* (1914; Alberta) 7 B. W. C. C. 1054.

<sup>34</sup> *McCormick v. Kelliher* (1912) 7 D. L. R. (B. C.) 732.

Where a workman fails in an action

An appeal from an order merely dealing with a question of costs, arising under this subsection, has been held by the court of appeal to lie to the divisional court.<sup>35</sup> But it was subsequently held by the divisional court that such an appeal lay to the court of appeal and not to the divisional.<sup>36</sup>

As to the awarding of costs generally in arbitration proceedings under the act, see cases construing paragraph 7 of the second schedule, cited post, 181.

#### **IV. Notice of the accident and claim for compensation (§ 2).**

##### **a. Text of § 2.**

Sec. 2. (1) Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided always that (a) The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defense by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

(b) The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings, if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

under the employers' liability act and an award of compensation is made under § 1, subsec. 4 of the compensation act, the costs to be deducted are the difference between the defendant's bill of costs in the action and the amount of costs to which the plaintiff would have been entitled had he proceeded originally under the compensation act. *Keane v. Nash* (1902; C. C.) 114 L. T. Jo. (Eng.) 102, 5 W. C. C. 53. An appeal from this decision was taken to the court of appeal, but it was there held that an appeal from an order denying a review of the taxation of costs lay to the divisional L.R.A.1916A.

(2) Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served.

(4) Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body.

[The changes in § 2 are matters of detail rather than of essential difference. The provisions in subsec. 1, in respect to the giving of an amended notice, and the postponing of the hearing, the making of an absence from the United Kingdom as a sufficient ground for failure to give notice, and the provisions in respect to entire failure to give notice, are new. The earlier act, by a subsection omitted from the act of 1906, provided as follows:

(4) The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.]

##### **b. In general.**

As to notice of injury under the American statutes, see post, 244.

court and not to the court of appeal. 19 Times L. R. (Eng.) 419, 88 L. T. N. S. 790, 5 W. C. C. 142.

<sup>35</sup> *Keane v. Nash* (Eng.) supra.

<sup>36</sup> An appeal from the decision of a county court judge in deducting from an award of compensation the costs of an action brought by an applicant under the employers' liability act in which she suffered a nonsuit lies to the court of appeal and not to the divisional court. *Williams v. Army & Navy Auxiliary Co-op. Soc.* (1907) 23 Times L. R. (Eng.) 408.



The word "proceedings" is used in a "sense different from that which would describe legal procedure ordinarily."<sup>37</sup> It signifies a claim for compensation, and a refusal of such compensation.<sup>38</sup> A notice of injury, not followed by a claim for compensation, is not a "proceeding."<sup>39</sup> And a request for arbitration made by an injured workman is not a notice of claim of which the employer must give notice to the insurance company, under his contract with the latter whereby it was provided that the insured should forward to the insurance company every written notice or information as to any verbal notice of claim arising through any accident.<sup>40</sup> The provisions of the public authorities protection act, 1893, relative to the time within which actions must be commenced, have no application to proceedings brought under the compensation act.<sup>41</sup>

If the workman has failed, without reasonable excuse and to the prejudice of the employer, to give notice as soon as practicable after the injury, such failure will bar his dependents from obtaining compensation for such injury after the workman's death.<sup>42</sup> So, where the father of a deceased workman, having failed to recover damages in an action against the employer and requested

compensation to be assessed under the act, had subsequently died, the mother and sisters of the deceased workman cannot, after six months have expired, be sisted so as to secure compensation as dependents.<sup>43</sup> But the dependents of a deceased workman may take advantage of the notice of injury and claim for compensation made by the deceased during his lifetime, and it is not necessary that such dependents file a new notice and claim after his death.<sup>44</sup>

### c. Form and contents of notice.

It has been held in several cases in the court of appeal that the notice of the injury must be in writing.<sup>45</sup> But in a case in the House of Lords compensation was awarded although it appeared that only a verbal notice was given; but the point actually decided was that the claim for compensation need not be for a stated amount.<sup>46</sup> In a later case in the House of Lords, however, the language used by one of the Lords delivering judgment merely indicates that in his opinion the notice should be in writing; but the point was not decided.<sup>47</sup>

The applicant is required to describe the nature of the injury but not the effects thereof.<sup>48</sup>

<sup>37</sup> Lord Halsbury & Powell v. Main Colliery Co. [1900] A. C. (Eng.) 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100.

<sup>38</sup> Powell v. Main Colliery Co. [1900] 2 Q. B. (Eng.) 145, 69 L. J. Q. B. N. S. 542, 64 J. P. 323, 48 Week. Rep. 534, 82 L. T. N. S. 340, 16 Times L. R. 282, reversed by the House of Lords on other points in [1900] A. C. (Eng.) 366.

<sup>39</sup> Perry v. Clements (1901) 17 Times L. R. (Eng.) 525, 49 Week. Rep. 669.

<sup>40</sup> Wilkinson v. Car & General Ins. Corp. (1914) 110 L. T. N. S. (Eng.) 468, [1914] W. N. 31, 58 Sol. Jo. 233.

<sup>41</sup> Fry v. Cheltenham Corp. (1911) 81 L. J. K. B. N. S. (Eng.) 41, 105 L. T. N. S. 495, 28 Times L. R. 16, 76 J. P. 89, 56 Sol. Jo. 33, [1911] W. N. 199, [1912] W. C. Rep. 105, 5 B. W. C. C. 162, 10 L. G. R. 1.

<sup>42</sup> Grime v. Fletcher [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 50 L. J. 55, 84 L. J. K. B. N. S. 847, 8 B. W. C. C. 69, [1915] W. N. 43, 59 Sol. Jo. 233.

<sup>43</sup> McGinty v. Kyle [1911] S. C. (Scot.) 589. The Lord President observed: "I cannot see that other people who have allowed the statutory time to pass can take to themselves the benefits of proceedings which during the six months allowed to them might never have been turned into a claim for compensation at all, and which only become proceedings for compensation belatedly." L.R.A. 1916A.

cause another person over whose volition they have no control has chosen to exercise a personal privilege."

<sup>44</sup> Moffat v. Crow's Nest Pass Coal Co. (1913) 7 B. W. C. C. (B. C.) 1040.

<sup>45</sup> Hughes v. Coed Talon Colliery Co. [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. N. S. 539, 100 L. T. N. S. 555; Griffiths v. Atkinson (1912) 106 L. T. N. S. (Eng.) 852, [1912] W. C. Rep. 277, 5 B. W. C. C. 345; Brady v. Canadian P. R. Co. (1913) 6 B. W. C. C. (Eng.) 680.

"I may say at once that *prima facie* the act says that notice in writing shall be given of the accident." Lord Cozens-Hardy, M. R., in Fox v. Barrow Hematite Steel Co. (1915) 84 L. J. K. B. N. S. (Eng.) 1327.

<sup>46</sup> Thompson v. Goad [1910] A. C. (Eng.) 409, 79 L. J. K. B. N. S. 905, 103 L. T. N. S. 81, 26 Times L. R. 526, 54 Sol. Jo. 599, 3 B. W. C. C. 392.

<sup>47</sup> In Hayward v. Westleigh Colliery Co. [1915] A. C. (Eng.) 540, 84 L. J. K. B. N. S. 61, 112 L. T. N. S. 1001, 31 Times L. R. 215, 8 B. W. C. C. 278, [1915] W. N. 67, 59 Sol. Jo. 269, reversing 7 B. W. C. C. 53, [1914] W. C. & Ins. Rep. 21, Earl Loreburn said that the notice was not given "in the form required by the statute, that is to say, a written notice." Compensation was nevertheless allowed because it was held that the employer had not been prejudiced by lack of prompt notice.

<sup>48</sup> The applicant who properly describes the nature of the accident does not fail

*d. To whom notice may be given.*

It is not necessary that notice be given to the employer personally.<sup>49</sup> But an employee who merely measures up the work given out and calculates the time allowed is not a proper person to whom notice could be given of the accident,<sup>50</sup> nor is the foreman of a department of a large factory.<sup>51</sup>

*e. Claim for compensation.*

This phrase means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation, sent to the workman's employer.<sup>52</sup> The claim need not be for a definite sum,<sup>53</sup>

merely because the injury is not accurately described from a medical point of view. *Sidney v. Collins* (1910) 3 B. W. C. C. (Eng.) 433.

<sup>49</sup> Where the overman of a level writes down the facts of the injury to a boy in a mine in the presence of the boy and his father, it is a sufficient notice. *Stevens v. Insoles* [1912] 1 K. B. (Eng.) 36, [1911] W. N. 205, 81 L. J. K. B. N. S. 47, 105 L. T. N. S. 617.

Notice of the accident to the cashier of the employer, whose duty it was to find a substitute for the workman and to determine the amount he should be paid, is notice to the company. *Butt v. Gellyceidrim Colliery Co.* (1909) 3 B. W. C. C. (Eng.) 44.

<sup>50</sup> *Jackson v. Vickers* [1912] W. C. Rep. (Eng.) 274, 5 B. W. C. C. 432.

<sup>51</sup> *Pimm v. Clement Talbot* [1914] 7 B. W. C. C. (Eng.) 565; *Plumley v. Ewart & Son* (1915) 8 B. W. C. C. (Eng.) 464.

<sup>52</sup> *Powell v. Main Colliery Co.* [1900] A. C. (Eng.) 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100, holding that the proceedings were in time where a workman sent to his employers, within six months, a notice of the accident, and also a notice stating that he claimed a certain amount as compensation for the injury, and then, more than six months after the accident, filed a request for arbitration in the county court. The decision of the court of appeal ([1900] 2 Q. B. (Eng.) 145, 69 L. J. Q. B. N. S. 542, 64 J. P. 323, 48 Week. Rep. 534, 82 L. T. N. S. 340, 16 Times L. R. 282) was reversed.

A letter was written by the agent of a deceased servant's father to the employer to the following effect: "I am instructed by his father to intimate that he holds you liable for compensation. This notice is given in terms of the statute." Held, that the letter was not a claim for compensation, but merely notice of an intention to make a claim. *Bennett v. Wordie* (1899) 1 Sc. Sess. Cas. 5th series, 855, 36 Scot. L. R. 643, 7 Scot. L. T. 10. L.R.A.1916A.

nor in writing.<sup>54</sup> But the fact that the wife of an injured workman asked the employer if he would compensate her and her children is not sufficient as a claim for compensation.<sup>55</sup> A request for arbitration is a sufficient "claim for compensation."<sup>56</sup> And a letter containing a notice of the accident and a description of the injuries, and a request to know what compensation would be allowed, and a further request for an immediate answer, is a claim for compensation.<sup>57</sup> So, a document wherein a workman made a claim for compensation for an injury received upon a designated day, "as per claim in the employers' liability act" is a valid claim.<sup>58</sup> And a statement in an answer to an application for compensation that, with-

<sup>53</sup> *Thompson v. Goold* [1910] A. C. (Eng.) 409, 79 L. J. K. B. N. S. 905, 103 L. T. N. S. 81, 26 Times L. R. 526, 54 Sol. Jo. 599, 3 B. W. C. C. 392, overruling former authorities and dicta to the contrary. To the same effect: *Fraser v. Great North of Scotland R. Co.* (1901) 3 F. 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96; *Allen v. Hoey* (1914) 49 Ir. Law Times, 39, 8 B. W. C. C. 424.

Among the cases that are to be considered as overruled are the following: *Marno v. Workman* (1899) 33 Ir. Law Times, 183, as cited in *Allen v. Hoey* (Ir.) supra; *Kilpatrick v. Wemyss Coal Co.* [1906-07] S. C. (Scot.) 320; *Maver v. Park* (1905) 8 Sc. Sess. Cas. 5th series (Scot.) 250; *Bennett v. Wordie* (1899) 1 F. 855, 36 Scot. L. R. 643, 7 Scot. L. T. 10; *Powell v. Main Colliery Co.* [1900] A. C. (Eng.) 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100 (dicta).

<sup>54</sup> *Lowe v. Myers* [1906] 2 K. B. (Eng.) 265, 75 L. J. K. B. N. S. 651, 95 L. T. N. S. 35, 22 Times L. R. 614. See also *Thompson v. Goold* (Eng.) supra.

A formal claim is unnecessary. *Devons v. Anderson* [1911] S. C. 181, 48 Scot. L. R. 187, 4 B. W. C. C. 354.

<sup>55</sup> *Johnson v. Wootton* (1911) 27 Times L. R. (Eng.) 487, 4 B. W. C. C. 258.

<sup>56</sup> *Wright v. Bagnall* [1900] 2 Q. B. (Eng.) 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327; *Fraser v. Great North of Scotland R. Co.* (1901) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

But a request on the part of an agent for the insurance company which has insured the employer, to accept compensation, does not do away with the necessity of filing a claim. *Devons v. Anderson* [1911] S. C. 181, 48 Scot. L. R. 187, 4 B. W. C. C. 354.

<sup>57</sup> *Treanor v. Wells* (1900; C. C.) 3 W. C. C. (Eng.) 58.

<sup>58</sup> *Linklater v. Webster* (1904) 6 W. C. C. (Eng.) 50.



in a few weeks of the accident, the respondent had paid the applicant a certain sum, which had been accepted in satisfaction of all claim, is evidence tending to show that the applicant had made some claim for compensation within the statutory six months.<sup>59</sup>

*f. Time within which claim must be made.*

The six months are to be reckoned from day to day without reference to the particular moment of the day at which the injury occurs or the notice is given.<sup>60</sup> A person partially dependent may await an award to one wholly dependent before filing his claim for a share in the award, although the time for

filing a claim against the employer has expired.<sup>61</sup>

*g. Employer "prejudiced in his defense."*

A trial judge is in error if he dismisses the proceeding, when he has determined that there was no good excuse for the want of notice. He is still bound to inquire whether the defendant was, as a matter of fact, prejudiced.<sup>62</sup>

Where the character of the injury is such that immediate care on the part of the employer will reduce the amount of compensation for which he is liable, he will be held to have been prejudiced by a failure on the part of the applicant to give immediate notice.<sup>63</sup> So, too, the

<sup>59</sup> *Lowe v. Myers* [1906] 2 K. B. (Eng.) 265, 75 L. J. K. B. N. S. 651, 95 L. T. N. S. 35, 22 Times L. R. 614.

<sup>60</sup> Where the accident occurred at 11:30 A. M. on November 24th, 1908, a claim for compensation lodged at 5:30 P. M. on May 24th, 1909, is within six months from the occurrence of the accident. *Peggie v. Wemyss Coal Co.* [1909-10] S. C. 93, 47 Scot. L. R. 149 (contention was that claim was not "timeous," because it was not put in until a later hour of the day on which the six months expired).

<sup>61</sup> *Smith v. Pearson* (1909; C. C.) 2 B. W. C. C. (Eng.) 468.

<sup>62</sup> *McLean v. Carse* (1899) 1 Sc. Sess. Cas. 5th series, 878, 36 Scot. L. R. 678, 7 Scot. L. T. 26.

<sup>63</sup> Where a lad working in a colliery scratched his hand, but paid no attention to it, and worked two days afterward, when it became worse, and his mother poulticed it, and he worked another day, after which he saw the company's physician and was ordered by him to stop work, and written notice was not given to the company for two weeks thereafter, the county court judge may find that the employers were prejudiced because of the failure to give the notice, where the doctor gave evidence that working after the injury did the hand considerable harm. *Snelling v. Norton Hill Colliery Co.* [1913] W. C. & Ins. Rep. (Eng.) 497, 109 L. T. N. S. 81, 6 B. W. C. C. 506. *Cozens-Hardy, M. R.*, stated that the lad was not to be blamed for not paying attention at first to a slight abrasion on the hand, but that he neglected for nearly two weeks to give notice after he had been informed by a doctor that his hand was in a serious condition.

The employer is prejudiced by failure of a workman to give prompt notice of an injury to his finger, where notice was not given for five days after the accident, at which time the finger was in such a septic condition that amputation was necessary, and where evidence tended to show that, had the wound been attended to promptly, and dressed with antiseptic dressing in due L.R.A.1916A.

time, subsequent trouble with it would not have occurred. *Wassell v. Russell* (1915) 112 L. T. N. S. (Eng.) 902.

The county court judge is not justified in finding that a notice had been given as soon as possible after an accident, and that the employer had not been prejudiced by the want of notice, where a barber's assistant claimed to have suffered an accident on January 17th, at which time his hand began to smart from dermatitis, and no notice was given until April, when two letters were written by the applicant's solicitor to the employer, claiming damages for injury caused by the use of a dangerous dry shampoo. *Petschett v. Preis* (1915) 31 Times L. R. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44.

A delay of over five months in giving notice of an accident will bar a claim for compensation, where the applicant, at the time of the alleged accident, was using a heavy beadle for driving piles into the ground, and had to drop it, as he felt that he had injured himself, the court holding that since there was no apparent injury, it was of the utmost importance that the employers should know of the alleged accident immediately. *Ing v. Higgs* (1914) 110 L. T. N. S. (Eng.) 442, [1914] W. C. & Ins. Rep. 86, 7 B. W. C. C. 65.

It is error for the county court judge to find that the employer was not prejudiced by failure to give notice as soon as practical after the accident, where the evidence showed that a charwoman fell upon the employer's staircase and injured her knee somewhat, and subsequently, because of the injury to her knee, fell upon her own staircase and received a serious injury, and no notice was given of the accident for three weeks after it occurred. *Hodgson v. Robins* [1914] W. C. & Ins. Rep. (Eng.) 65, [1914] W. N. 47, 7 B. W. C. C. 232.

The county court judge may find that the employers were prejudiced by the failure of a workman to give notice promptly where he injured his thumb on February 19th, and treated the accident as trivial,

employer will be considered prejudiced where, because of the lapse of time, it is difficult to tell whether the claimant is suffering from the injury or from some other cause.<sup>64</sup> The county court judge is not justified in finding that the employer was not prejudiced by the failure of the workman to give notice of his injury until two months after, where the job was finished on the day of the accident, and the men were all paid off.<sup>65</sup> But the county court judge may find that the employers were not prejudiced by failure to give notice of the accident, where there was no evidence that, if the notice had been given immediately after the accident, they would have been in any better position than they actually were at the time when the notice was given.<sup>66</sup>

and accidentally hit the thumb again and reopened the wound on March 10th, and the thumb grew gradually worse until, on March 19th, he consulted the doctor, who found that he was suffering from blood poisoning, and grew continually worse until he died on March 27th of blood poisoning, and no notice of the accident, was given to the employers until after his death. *Taylor v. Nicholson* [1915] W. C. & Ins. Rep. (Eng.) 42, 8 B. W. C. C. 114.

<sup>64</sup> The county court judge may find that failure to give notice for four months is prejudicial to the employer where the latter's doctor has testified that it would have been easier to judge whether the employee's condition was due to the injury or not if he had seen him earlier. *Bramley v. Evans* (1909) 3 B. W. C. C. (Eng.) 34.

The employer may be found to be prejudiced by failure to give notice as soon as practicable after the accident where it appeared that the notice was not given until four weeks after the accident, and that the employer's witnesses were unable at that time to remember the particular work that the injured workman was doing at the time of the accident. *Ungar v. Howell* [1914] W. C. & Ins. Rep. (Eng.) 58, 7 B. W. C. C. 36.

It is error for the county court judge to hold that the employer was not prejudiced by failure to receive notice of an accident for two weeks after it occurred, where the only evidence of an accident was that given by a fellow workman of the employee, who testified that he had helped extract a splinter from the left hand of the deceased, and the doctor who attended the workman testified that the workman, who died about ten days after the injury, was suffering from septic poisoning in the right arm. *Ford v. Gaiety Theatre* [1914] W. C. & Ins. Rep. (Eng.) 53, 7 B. W. C. C. 197.

It cannot be said that the master was not prejudiced by not having notice of the accident within a reasonable time after it occurred, where the medical evidence showed that the abscess from which the applicant L.R.A.1916A.

The fact that the employer knew of the injury, and was kept informed as to the workman's condition, tends to show that he was not prejudiced by a failure to give the notice.<sup>67</sup> So, too, it may be said that the employer was not prejudiced where the workman consulted the employer's doctor a day or two after he met with the accident, and the doctor learned the whole history of the occurrence, prescribed the proper medical treatment, and recommended eye specialists, who were consulted.<sup>68</sup> The mere length of time before the notice was given after the accident is usually immaterial on the question of prejudice to the employer. But, in a few cases, emphasis has been laid upon the lapse of time.<sup>69</sup>

The statute provides that the want

was suffering might have come from other causes, although it most probably came from this blow. *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 81 L. J. K. B. N. S. 696, 106 L. T. N. S. 663, [1912] W. C. Rep. 250, [1912] W. N. 89, 5 B. W. C. C. 284.

<sup>65</sup> *Burrell v. Holloway Bros.* (1911) 4 B. W. C. C. (Eng.) 239.

<sup>66</sup> *Haward v. Rowsell* [1914] W. C. & Ins. Rep. (Eng.) 314, 7 B. W. C. C. 552.

It may be found that an employer was not prejudiced by reason of the failure of an injured employee to give him written notice of the accident, where the employee had received full medical advice and attendance from several doctors immediately following the injury, and upon the advice of two of the doctors underwent an operation. *Barrie v. Diamond Coal Co.* (1914; Alberta) 7 B. W. C. C. 1061.

Where a boy employed as a painter left off work because of illness, and about a month after consulted his doctor, who sent him to bed, and he was in bed for five months, and, as soon as he could get out, went to his employers and told them of his illness, and that the doctor thought it was lead poisoning, and subsequently became worse, and about two months afterwards a formal complaint for compensation was made, and the certifying surgeon stated that the boy was suffering from lead poisoning, and that the disablement commenced at about the time he left off work, compensation was allowed him over the objection of the employers that notice was not given in time, and that they had been prejudiced. *Sanderson v. Harkinson* (1913) 6 B. W. C. C. (Eng.) 648.

<sup>67</sup> The employers cannot be said to have been prejudiced for failure of statutory notice where they had full knowledge of the accident as soon as practicable after it happened, and repeatedly had reports from the workman, which they sent on to their insurance company. *Stinton v. Brandon Gas Co.* [1912] W. C. Rep. (Eng.) 132, 5 B. W. C. C. 426.

<sup>68</sup> *Bruno v. International Coal & Coke Co.* (1913; Alberta) 7 B. W. C. C. 1033.



of a notice shall not be a bar to the maintenance of proceedings if it is found that the employer is not "prejudiced in his defense" by such want of notice; consequently the court of appeal has held that the fact that the employer was not able to give the insurance company notice of the accident, thereby losing his right of indemnity against such insurance company, is not relevant upon the question of prejudice, since such failure to give notice to the insurance company does not prejudice the employer in his defense to the action by the employee.<sup>70</sup> A contrary decision by the county court judge must be considered as

overruled, although no mention is made of this case in the court of appeal.<sup>71</sup>

The onus lies on the workman to show that the employer has not been prejudiced by the former's failure to give due notice of the accident.<sup>72</sup> If the arbitrator refuses to find that the employer was not prejudiced, and there is evidence to support his conclusions, the court of appeal will not interfere.<sup>73</sup> It is not error for the county court judge to omit the words "in his defense" in a finding that the workman had not discharged the onus of proving that the employers "had not been prejudiced."<sup>74</sup>

<sup>69</sup> A failure to give notice for four months is unreasonable, and may be found prejudicial to the employer. *Stronge v. Hazlett* (1910) 44 Ir. Law Times, 10, 3 B. W. C. C. 581.

The employers will presumably be prejudiced by a failure to give notice of an accident for upwards of five months. *Shannon v. Bainbridge Weaving Co.* (1911) 45 Ir. Law Times, 74.

A delay of four months in giving notice of injury which results in hernia is prejudicial to the employers. *Jackson v. Vickers* [1912] W. C. Rep. (Eng.) 274, 5 B. W. C. C. 432.

<sup>70</sup> *Butt v. Gellyceidrim Colliery Co.* (1909) 3 B. W. C. C. (Eng.) 44.

<sup>71</sup> A delay in giving notice of a claim to the respondent, whereby he loses his right to indemnity against an insurance company, is prejudicial to him. *Barker v. Holmes* (1904; C. C.) 117 L. T. Jo. (Eng.) 158, 6 W. C. C. 52.

<sup>72</sup> *Shearer v. Miller* (1899) 2 Sc. Sess. Cas. 5th series, 114, 37 Scot. L. R. 80, 7 Scot. L. T. 231; *Hancock v. British Westinghouse Electric Co.* (1910) 3 B. W. C. C. (Eng.) 210; *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. N. S. 539, 100 L. T. N. S. 555; *Dalgiesh v. Gartside* [1914] W. C. & Ins. Rep. (Eng.) 319, 7 B. W. C. C. 535; *Hodgson v. Robins* [1914] W. C. & Ins. Rep. (Eng.) 65, [1914] W. N. 47, 7 B. W. C. C. 232; *Hunt v. Highley Min. Co.* [1914] W. C. & Ins. Rep. (Eng.) 402, 7 B. W. C. C. 716; *Murphy v. Shirebrook Colliery* [1913] W. C. & Ins. Rep. (Eng.) 184, 6 B. W. C. C. 237; *Pimm v. Clement Talbot* [1914] W. C. & Ins. Rep. (Eng.) 350, 7 B. W. C. C. 565; *Tibbs v. Watts* (1909) 2 B. W. C. C. (Eng.) 164; *Eydmann v. Premier Accumulator Co.* [1915] W. C. & Ins. Rep. (Eng.) 82, 8 B. W. C. C. 121.

The applicant must prove that he gave notice of the claim within six months of the occurrence of the accident, or that his failure to do so was occasioned by mistake, absence from the United Kingdom, or other reasonable cause. *Roberts v. Crystal Palace Foot Ball Club* (1909) 3 B. W. C. C. (Eng.) 51.

Where no notice of the accident was L.R.A.1916A.

given until nearly a month thereafter, the applicant must show affirmative proof that the employer was not prejudiced by failure to give prompt notice. *Lacey v. Mowlem* [1914] W. C. & Ins. Rep. (Eng.) 63, 7 B. W. C. C. 135.

Where the workman had failed to give notice of the injury within a reasonable time, affirmative evidence must be introduced to show that the employer was not prejudiced because of such failure. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 50 L. J. 55, 84 L. J. K. B. N. S. 847, [1915] W. N. 43, 59 Sol. Jo. 233, 8 B. W. C. C. 69.

In *Hayward v. Westleigh Colliery Co.* [1915] A. C. (Eng.) 540, 84 L. J. K. B. N. S. 661, 112 L. T. N. S. 1001, 31 Times L. R. 215, [1915] W. N. 67, 59 Sol. Jo. 269, 8 B. W. C. C. 278, reversing, [1914] W. C. & Ins. Rep. 21, 7 B. W. C. C. 53, it was held that the arbitrator might hold that the employers were not prejudiced where there was no inherent probability that could be seen that the employers would be prejudiced by the absence of a notice for a few days, and they gave no evidence that they had been prejudiced.

A workman has the burden of showing that the employer has not been prejudiced, or, if the employer has been prejudiced, the workman must prove that the want of notice was occasioned by a mistake or other reasonable cause. *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 81 L. J. K. B. N. S. 696, 106 L. T. N. S. 663, [1912] W. C. Rep. 250, [1912] W. N. 89, 5 B. W. C. C. 284.

The workman has not discharged the burden of proving that the employers were not prejudiced by delay in giving notice where he claimed to have been ruptured on the 27th of the month, and gave notice on the 30th, when there was no reason given for the delay, and no evidence to show that the employer had not been prejudiced. *Nicholls v. Briton Ferry U. D. C.* [1915] W. C. & Ins. Rep. (Eng.) 14, 8 B. W. C. C. 42.

<sup>73</sup> *Miller v. Richardson* [1915] 3 K. B. (Eng.) 76, 84 L. J. K. B. N. S. 1366.

<sup>74</sup> *Snelling v. Norton Hill Colliery Co.* [1913] W. C. & Ins. Rep. (Eng.) 497, 109 L. T. N. S. 81, 6 B. W. C. C. 506.

***h. Excuses for not giving notice or making claim in time.***

The provision which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury is not necessarily an absolute bar to proceedings for the assessment of compensation, commenced after six months by an injured workman; and the county court judge or other arbitrator has jurisdiction to inquire whether there are any circumstances in

the case to debar the employer from raising that defense. Where the serious character of the injury is apparent, and the workman has had opportunity to give the notice, failure so to do for a considerable time afterwards will bar compensation.<sup>75</sup> But the fact that the consequences of the injuries were not apparent at the time has been held to be a sufficient excuse for not giving notice immediately.<sup>76</sup> This is particularly true where a disease caused by the accident subsequently supervened,<sup>77</sup> or where

<sup>75</sup> Where a workman met with an accident causing him to bite his tongue, which accident he immediately reported verbally to the foreman of the work, but stated that he was not severely injured, and the accident was also reported to one of the employers, who happened to be present at the time, and four days afterwards the workman was attended by his own doctor, who found that he was suffering from an open, discharging wound in his tongue, and the doctor continued to attend the workman for some time, and the difficulty of taking food increased, but the workman continued to work for about six months, when, after laying off for a week, he died of cancer of the tongue, there is no reasonable cause for failing to give notice of the accident as required by § 2 of the act. *Potter v. Welch* [1914] 3 K. B. (Eng.) 1020, 30 Times L. R. 644, [1914] W. N. 106, 317, 137 L. T. Jo. 290, 83 L. J. K. B. N. S. 1852, 7 B. W. C. C. 738.

Where a workman fell from a loft and injured his head, and was off from duty for about two days and a half, when he returned, and thereafter continued to work for upwards of six months, during all of which time he complained of headaches as result of the fall, and after that time he became insane, he is not entitled to compensation, where no notice was given of the accident until fully a year after it occurred, as his case did not fall within the proviso to § 2. *Clapp v. Carter* (1914) 110 L. T. N. S. (Eng.) 491, 58 Sol. Jo. 232, [1914] W. C. & Ins. Rep. 82, 7 B. W. C. C. 28.

A county court judge may find that notice was not given as soon as practical after the accident, where it was not given until one month after, although the claimant had seen his employer twice in the meantime. *Leach v. Hickson* (1911) 4 B. & W. C. C. (Eng.) 153.

There is no reasonable excuse for failure to give notice of the injury where the workman was injured by a splinter of iron entering his eye, and upon the day of the injury he consulted his own physician, and thereafter for upwards of two weeks, he suffered great pain, and then consulted another doctor, and, sixteen days after the injury, committed suicide. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 50 L. J. 55, 84 L. J. K. B. N. S. 847, [1915] W. N. 43, 59 Sol. Jo. 233, 8 B. W. C. C. 69.  
L.R.A.1916A.

It is error for the county court to ignore the fact that no written notice of the accident was given where the workman had injured his knee by a fall, and no notice of any kind was given for upwards of three weeks, and no medical attendance was had by the workman for that period. *Coltman v. Morrison* (1914) 7 B. W. C. C. 194, [1914] W. C. & Ins. Rep. (Eng.) 44.

It cannot be said that notice was given as soon as practicable after an accident, where the workman had been injured by a blow from a chip off a brick, the notice was not given until three weeks thereafter, and subsequent to the death of the workman. *Hunt v. Highley Min. Co.* (1914) 7 B. W. C. C. (Eng.) 716.

Notice of the accident is not given as soon as practicable after the happening thereof, where a workman cut his knuckle and burned it on Wednesday, and worked the two following days, and by the morning of Saturday, the injured finger was in such a condition that the workman could not hold his hammer, and at 10 o'clock had to knock off work and go home, and consulted a doctor upon Monday, at which time the finger was in such a septic condition that it had to be amputated. *Wassell v. Russell* (1915) 112 L. T. N. S. (Eng.) 902, [1915] W. C. & Ins. Rep. 88, [1915] W. N. 69, 8 B. W. C. C. 230.

A man who received a serious cut upon his thumb, which, after being properly dressed upon three different occasions, still continued to pain him severely for about a month, was not justified in failing to notify the employer of the injury until over a month after the accident. *Dalgiesh v. Gartside* [1914] W. C. & Ins. Rep. (Eng.) 319, 7 B. W. C. C. 535.

<sup>76</sup> That the consequences of a strain were not apparent at the time is a sufficient excuse for not giving notice of the injury. *Tibbs v. Watts* (1909) 2 B. W. C. C. (Eng.) 164.

The workman may be found justified in not giving notice for a period of nine months, where the effect of the injury was not apparent during that time. *Fry v. Cheltenham Corp.* [1911] W. N. (Eng.) 199, 81 L. J. K. B. N. S. 41, 105 L. T. N. S. 495, 28 Times L. R. 16, 56 Sol. Jo. 33, 5 B. W. C. C. 162.

<sup>77</sup> That a workman did not know for six months that she had suffered a nervous shock from a fire, which subsequently



the workman's doctor did not know what was the matter with him.<sup>78</sup> So, the fact that the injuries were slight, and the workman did not intend to ask compen-

sation, may, under all the circumstances of the case, be a sufficient excuse for not giving notice.<sup>79</sup> But notice must be given as soon as the dangerous character

caused a serious disease, is sufficient reason for failure to give notice of the accident. *Hoare v. Arding* (1911) 5 B. W. C. C. (Eng.) 36.

Where the applicant received a blow on the right side of her head, and there were no immediate effects, but subsequently traumatic epilepsy supervened, and she gave notice shortly after she knew that the epilepsy was caused by the blow, the county court judge may find that the employers were not prejudiced, although it was about six months after the injury. *Eaton v. Evans* (1911) 5 B. W. C. C. (Eng.) 82.

It is a sufficient excuse for not giving notice of an accident that the workman did not lose any time from his work for several months, and the disease which subsequently supervened was latent in character, and the workman did not know that it was the result of the accident. *Thompson v. North-Eastern Marine Engineering Co.* (1914) 110 L. T. N. S. (Eng.) 441, [1914] W. N. 22, [1914] W. C. & Ins. Rep. 13, 7 B. W. C. C. 49.

<sup>78</sup> It is a sufficient excuse for failure to give notice for several months, that neither the workman nor his doctors knew what ailed him. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. A. 230. *Cozens-Hardy, M. R.*, said: "Neither of the doctors was at the time prepared to say that there had been an accident within the meaning of the act. The wife, of course, knew that her husband was very ill, and ill from a disease from which he died, but it was not present to any of their minds that there had been an accident in respect of which notice should have been given. I think, therefore, that there was 'reasonable cause' for not giving the notice, and although the absence of notice may have, to some extent, prejudiced the employer, in my opinion it does not prevent the applicant from succeeding if she can prove that it was an injury by accident within the meaning of § 1, subsec. 1."

It may be held that a delay in giving notice for about eight months is by mistake where the workman was told by a doctor that the pain which he suffered was due to muscular rheumatism, and not to injury. *Ellis v. Fairfield Shipbuilding & Engineering Co.* [1913] S. C. 217, [1913] W. C. & Ins. Rep. 88, 6 B. W. C. C. 308, 50 Scot. L. R. 137, [1912] 2 Scot. L. T. 485.

<sup>79</sup> Where an employee did not regard his injury as so serious as his doctor's advice should have led him to suppose, and he did not intend to make any claim under the act if his recovery had been as satisfactory as he expected, he is not barred from obtaining compensation, although he failed to give notice for five months after his injuries, and the employers were preju-

diced by his failure to give timely notice, since the want of notice was occasioned by mistake for which there was reasonable cause. *Rankine v. Alloa Coal Co.* (1904) 6 Sc. Sess. Cas. 5th series, 375, 41 Scot. L. R. 306, 11 Scot. L. T. 670.

Where an injured workman intentionally did not give notice of his accident at the time, believing that his injuries would not keep him from work, but after going to the hospital realized that his injuries were serious, and gave written notice of the accident to his employers about three months after the accident, his delay in giving notice is due to mistake or other reasonable cause within the meaning of § 2. *Brown v. Lochgelly Iron & Coal Co.* [1907] S. C. (Scot.) 198.

There is reasonable cause for failing to give a formal notice of the injury, where the claimant believes that his injuries are not serious, and a day after the accident, and again a month after, he gives a verbal notice of it. *Refuge Assur. Co. v. Millar* (1911) 49 Scot. L. R. 67.

The failure of a collier to give notice within six months that he was suffering from nystagmus is excusable where he had received medical advice that the disease could be cured by spending a short time above ground, and, there being at that time a strike at his mine, he hoped during the continuance thereof to live in the open air, and, by adopting the course recommended by the doctor, to cure the disease, and not put in a claim. *Moore v. Naval Colliery Co.* [1912] 1 K. B. (Eng.) 28, 81 L. J. K. B. N. S. 149, 105 L. T. N. S. 838, 5 B. W. C. C. 87, [1912] W. C. Rep. 81.

Where an injured workman failed to give notice of the accident because he thought his injuries were only slight, and did give actual notice only eighteen weeks after the injury, the excuse is reasonable. *Millar v. Refuge Assur. Co.* [1912] S. C. 37, 49 Scot. L. R. 67, 5 B. W. C. C. 522.

Delay may be found to be due to reasonable cause where the workman was aged and crippled, and feared that if he applied for compensation the insurance company would not permit the employers to retain him, and he did give notice shortly after he found that he would never be able to work again. *Breakwell v. Cleve Hill Granite Co.* (1911) 5 B. W. C. C. (Eng.) 133.

A county court judge is justified in finding that a workman had reasonable cause for failing to give notice of an injury which resulted in a rupture, where, although he was aware at the time that he had received some form of an injury, did not think that it was serious, and, as a matter of fact, did not lose an hour's time for months after receiving such injury, and did give notice as soon as he realized that the injury was of a serious character. *Zillwood v. Winch*

of the injury appears,<sup>80</sup> and the mere hope on the part of the injured workman that he would get better and would not have to make any claim has been held not sufficient to justify him in delaying the making of the claim for over two months, where he suffered severely all of the time.<sup>81</sup> So, the fact that a workman thought that an injury to his knuckle was trivial is not sufficient reason to justify his failure to give notice of the accident, where, two days after the accident, the finger pained him so that he could not hold his hammer, and

was obliged to knock off work, and two days thereafter the finger was in such a septic condition that amputation was necessary.<sup>82</sup> And the fact that a miner's doctor did not think that his injury would turn out seriously does not justify him in regarding it as trivial, where, as a matter of fact, it prevented him from doing his ordinary work.<sup>83</sup>

The mistake referred to in § 2 is a mistake of fact, and not a mistake of law,<sup>84</sup> and ignorance of the existence of the compensation act does not excuse failure to give the notice.<sup>85</sup> The unful-

[1914] W. C. & Ins. Rep. (Eng.) 87, 7 B. W. C. C. 60.

Failure to give notice of injury for upwards of two years may be found to be excusable where the injury was caused by a strain, and the workman did not know that he was severely injured, and, after resting for an hour, was able to go on with his work, and the injury did not trouble him during the interval except on one occasion, and then but slightly, and notice was given shortly after he became incapacitated. *Coulson v. South Moor Colliery Co.* (1915) 84 L. J. K. B. N. S. (Eng.) 508, 112 L. T. N. S. 901, 31 Times L. R. 207, [1914] W. C. & Ins. Rep. 161, [1915] W. N. 83, 8 B. W. C. C. 253.

The county court judge may find that notice was given as soon as practical after the injury, where the workman was injured by the slipping of his bicycle, but did not believe that his injuries were serious, and gave notice about two months thereafter, as soon as he learned that a cancer had developed from the injury. *Haward v. Rowsell* [1914] W. C. & Ins. Rep. (Eng.) 314, 7 B. W. C. C. 552.

<sup>80</sup> Where a workman was injured by a blow on the breast, which in a few days did not appear to be at all dangerous, and was latent for six months, when a swelling came on his breast, and he failed for nearly six months thereafter from giving notice to the employers in respect to the injury, he cannot obtain the benefit of the proviso of § 2, subsec. 1. *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 81 L. J. K. B. N. S. 696, 106 L. T. N. S. 663, [1912] W. C. Rep. 250, [1912] W. N. 89, 5 B. W. C. C. 284.

Notice of the accident cannot be held to have been given within a reasonable time, where a man suffered a slight injury, and the wound thereafter healed, but septic poisoning supervened, and no notice was given for nearly a month after the workman knew that his condition was serious. *Eydmann v. Premier Accumulator Co.* (1915) 8 B. W. C. C. (Eng.) 121.

<sup>81</sup> *Webster v. Cohen Bros.* (1913) 108 L. T. N. S. (Eng.) 197, 29 Times L. R. 217, [1913] W. C. & Ins. Rep. 268, 57 Sol. Jo. 244, 6 B. W. C. C. 92.

<sup>82</sup> *Wassel v. Russell* (1915) 112 L. T. N. S. (Eng.) 902 [1915] W. C. & Ins. Rep. 88, [1915] W. N. 69, 8 B. W. C. C. 230. L.R.A.1916A.

<sup>83</sup> *Fox v. Barrow Hematite Steel Co.* (1915) 84 L. J. K. B. N. S. (Eng.) 1327, *Pickford, L. J.*, said: "The only cause that is suggested here is that the workman honestly thought, and had reason to think, that the injury was trivial. Now, in a sense I think he had. That he thought and had reason to think that the injury would very soon get better in the ordinary course of things I think was the case; but I do not think that that concludes the matter. If, at the time, the injury was of a nature, although trivial from the point of view which I have already indicated, to interfere with the man's ordinary avocation, it could not, I think, within the cases which have been referred to and other similar cases, which are many, be considered as trivial. Of course, whether this be so or not depends upon the view taken of the evidence, and I confess I take the view that the learned county court judge took of the evidence,—namely, that, although the man thought that this injury would in all probability get better in a very short time, and turn out as, in ordinary language, nothing serious, and although the doctor's evidence shows he was justified in so thinking, still, while the injury existed in the condition in which it was immediately after the accident and before it got worse, the man was not able to work. He did not work in the evening the accident happened,—I mean, at his ordinary work. He only helped to push a tub, and he did not work at his ordinary work because of the injury to his eye, which prevented him from so doing,—perhaps not absolutely made it impossible for him to work, but prevented him in the ordinary sense from working. . . . It seems to me that an injury which incapacitates a man or hinders a man seriously from doing his ordinary work cannot be considered so trivial as to make it reasonable for him not to give notice of it, simply because the man thinks, and has reason to think, that it will in all probability get better within a short time."

<sup>84</sup> *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 81 L. J. K. B. N. S. 696, 106 L. T. N. S. 663, [1912] W. C. Rep. 250, [1912] W. N. 89, 5 B. W. C. C. 284; *Bruno v. International Coal & Coke Co.* (1913; Alberta) 7 B. W. C. C. 1033.

<sup>85</sup> *Roles v. Pascall* [1911] 1 K. B. (Eng.)



filled expectation of a workman employed by a subcontractor that the latter will notify the chief contractor of an accident to the workman of which the latter notified the subcontractor is not a statutory mistake.<sup>86</sup>

982, 80 L. J. K. B. N. S. 728, 104 L. T. N. S. 298, 4 B. W. C. C. 148; *Melville v. McCarthy (Ir.)* [1913] W. C. & Ins. Rep. 353, cited in Law Reports Current Dig. 1913, col. 725; *Judd v. Metropolitan Asylums Board* [1912] W. C. Rep. (Eng.) 220, 5 B. W. C. C. 420; *Bruno v. International Coal & Coke Co.* (1913; *Alberta*) 7 B. W. C. C. 1033.

<sup>86</sup> Where a workman merely tells the subcontractor who employs him of his injury, in the expectation that the subcontractor will tell the employer, and does not give written notice for five months, there is no mistake which will excuse the failure to give notice. *Griffiths v. Atkinson* (1912) 106 L. T. N. S. (Eng.) 852, [1912] D. C. Rep. 277, 5 B. W. C. C. 345.

<sup>87</sup> Failure to give notice for over two years may be found to be excusable where the workman was sick during that period, and was in a foreign country, spending most of the time in hospitals. *Dight v. Craster Hall* [1913] 3 K. B. (Eng.) 700, 82 L. J. K. B. N. S. 1307, 109 L. T. N. S. 200, 29 Times L. R. 676, [1913] W. N. 259, 6 B. W. C. C. 674.

The failure to give prompt notice of the accident is excusable where the applicant was absent from the United Kingdom at the time, and the delay after her return, which was accomplished as soon as practicable, was occasioned by legal advice to the effect that her time to give notice had expired. *Smith v. Pearson* (1909; C. C.) 2 B. W. C. C. (Eng.) 468.

The finding of the county court judge that a workman's failure to make a claim within six months was "due to" his absence from the United Kingdom, instead of finding that it was "occasioned by," does not invalidate his finding. *Dight v. Craster Hall* (Eng.) *supra*.

<sup>88</sup> The fact that the applicant had been eight weeks in the hospital is a reasonable excuse for not giving notice within six weeks. *Ex parte Dunn* (1911) 28 W. N. New So. Wales, 9.

<sup>89</sup> An agreement arrived at between the parties shortly after the accident, that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defense that the request for arbitration was not filed within six months of the accident. Having allowed the six months to expire while the negotiations were still proceeding, the employer cannot then turn round and say that the time for claiming compensation has gone by. *Wright v. Bagnall* [1900] L.R.A.1916A.

Absence from the United Kingdom has been held a sufficient excuse in a few cases,<sup>87</sup> as has serious sickness immediately following the injury.<sup>88</sup>

The conduct of the employer may be such that he will be held to have waived the giving of the notice,<sup>89</sup> or any defects

2 Q. B. (Eng.) 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327.

Where a workman engaged in lifting heavy cases felt a severe strain internally, and informed his foreman that an old rupture had come down, and that he would consult a doctor, and having been informed by the doctor that he would have to undergo an operation, he so informed his employer, who agreed to make weekly payments of half wages, the county court judge may find that the employer had been informed of the accident as soon as possible, and was not prejudiced by want of or any defect or inaccuracy in the notice, although he had not been given a written notice. *Ralph v. Mitchell* [1913] W. C. & Ins. Rep. (Eng.) 501, 6 B. W. C. C. 678.

Employers who have paid full compensation for more than four months are thereafter estopped from claiming that notice of the accident was not given as soon as possible, and that they were prejudiced thereby. *Turnbull v. Vickers* (1914) 7 B. W. C. C. (Eng.) 396.

In *Luckie v. Merry* (1915) 31 Times L. R. (Eng.) 466, [1915] W. N. 243, 59 Sol. Jo. 544, it was held that the county court judge may find that there was reasonable excuse for failure to give notice of an accident, where the injured workman had been for seventeen years in the employment of the respondent as a horse keeper, and, upon crushing his fingers, went to the employer, who told him to potter in the factory until he was better, which he did, and for more than six months remained in the employment, doing his old work and receiving his old wages, when he was discharged for reasons not connected with the accident. The master of the rolls distinguished two Irish cases which were cited by the county court judge as authority for holding that there was no reasonable excuse shown. The first of these cases was *Healy v. Galloway*, 41 Ir. Law Times, 5, which was a case under the old law, which did not provide for a plea of reasonable excuse. The decision of the court in this case was that the mere fact that the employer had paid wages after the accident was not such a circumstance as amounted to a waiver by the employer of the necessity of making a claim, or, to put it in another way, was not a foundation for an estoppel to prevent the master from asserting that no claim had been made. The *Healy Case* was cited in the second case mentioned, *Lynch v. Lansdowne*, 48 Ir. Law Times, 89, as authority for the proposition that mere payment of wages from an employer to an injured workman after the latter has been injured, is not

therein;<sup>90</sup> but the mere payment of some compensation is not such a waiver as a matter of law.<sup>91</sup>

*F. Substitution of scheme approved by friendly society for provisions of the act (§ 3).*

*a. Text of § 3.*

Section 3. (1) If the registrar of friendly societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favor of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act, and thereupon the employer shall be liable only in accordance with the scheme; but, save as aforesaid, this act shall apply notwithstanding any con-

tract to the contrary made after the commencement of this act.

(2) The registrar may give a certificate, to expire at the end of a limited period of not less than five years, and may from time to time renew, with or without modifications, such a certificate, to expire at the end of the period for which it is renewed.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

(4) If complaint is made to the registrar of friendly societies, by or on behalf of the workmen of any employer, that the benefits conferred by any scheme no longer conform to the conditions stated in subsection (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the registrar of friendly

sufficient to enable the court to draw the inference that the workman had reasonable cause, within the meaning of the statute, for not making the claim within six months from the date of the accident. The master of the rolls, in *Luckie v. Merry*, stated that the *Healy Case* could not be authority upon this point because, in that case, there was no question of reasonable cause whatsoever.

<sup>90</sup> Employers, by paying compensation for seven weeks, waived any defect in the notice of accident. *Davies v. Point of Ayr Collieries* (1909) 2 B. W. C. C. (Eng.) 157.

<sup>91</sup> The mere fact that the employer has made weekly payments to a workman is not such evidence of an admission of liability and of an agreement to pay compensation as will enable the workman to commence proceedings under the act after the expiration of six months from the accident, where the employer took a receipt which stated that the money was received on account of compensation which might be or become due to the workman under the act. *Rendall v. Hill's Dry Docks & Engineering Co.* [1909] 2 Q. B. (Eng.) 245, 69 L. J. Q. B. N. S. 554, 64 J. P. 451, 48 Week. Rep. 530, 82 L. T. N. S. 521, 16 L.R.A.1916A.

*Times L. R.* 368, distinguishing *Wright v. Bagnall* [1900] 2 Q. B. (Eng.) 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 *Times L. R.* 327, *supra*.

The fact that an employer for a period of about six months voluntarily paid an injured workman a sum in excess of what he would have had to pay under the act does not bar him from pleading the omission to begin proceedings within the prescribed six months, where nothing at all had been said between the parties as to the act. *O'Neill v. Motherwell* [1906-07] S. C. (Scot.) 1076.

Employers are not estopped from claiming that the act is inapplicable by the fact that shortly after the accident they wrote to the workman's daughter that if she would forward them a certificate of the doctor attending him, stating the nature of the injuries and the probable period of injury, they would pay him whatever was due him under the act during his illness, dating one week from the day of the accident, and that they did not so pay him for a period of about six months. *Ross v. Smith* (1909) *So. Austr. L. R.* 128.



societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the registrar of friendly societies.

(7) The chief registrar of friendly societies shall include in his annual report the particulars of the proceedings of the registrar under this act.

(8) The chief registrar of friendly societies may make regulations for the purpose of carrying this section into effect.

[The changes in § 3 are for the most part mere matters of detail.]

#### *b. Construction of this section.*

The provision in the statute against contracting out of the statute refers only to contracts as to future injuries.<sup>92</sup> A penal clause in an agreement whereby a workman is to lose all rights to compensation unless he insists in an application for examination by a medical referee under certain circumstances is void under § 3, subsec. 1 of the act.<sup>93</sup> A contract, under § 3, need not be in writing.<sup>94</sup>

A workman who has agreed to accept the provisions of a duly certified scheme cannot resort to the act in any way.<sup>95</sup>

<sup>92</sup> Ryan v. Hartley [1912] 2 K. B. (Eng.) 150, 81 L. J. K. B. N. S. 666, 106 L. T. N. S. 702, [1912] W. C. R. 236, [1912] W. N. 115, 5 B. W. C. C. 407.

<sup>93</sup> British & S. A. Steam Nav. Co. v. Neil (1910) 3 B. W. C. C. (Eng.) 413.

<sup>94</sup> Berry v. Canteen & Mess. Co-op. Soc. (1910) 3 B. W. C. C. (Eng.) 449.

<sup>95</sup> Godwin v. Lords Comrs. of Admiralty [1913] A. C. (Eng.) 638, 82 L. J. K. B. N. S. 1126, 109 L. T. N. S. 428, 29 Times L. R. 774, [1913] W. N. 267, 6 B. W. C. C. 788, affirming Court of Appeal [1912] 2 K. B. 26, 81 L. J. K. B. N. S. 532, 106 L. T. N. S. 136, 28 Times L. R. 229, [1912] W. C. Rep. 49, 5 B. W. C. C. 229, 56 Sol. Jo. 307, [1912] W. N. 45.

A workman who has come in under a scheme, duly certified under § 3 of the act, and has signed an agreement, is outside of the provisions of the act altogether, and cannot subsequently obtain compensation from the employer, although the scheme was terminated in consequence of its not being recertified under the act. Howarth v. Knowles [1913] 3 K. B. (Eng.) 675, 82 L. J. K. B. N. S. 1325, 109 L. T. N. S. 278, 29 Times L. R. 667, 57 Sol. Jo. 471, [1913] W. N. 237, 6 B. W. C. C. 596.

<sup>96</sup> A workman who has signed an agreement to accept compensation certified by L.R.A.1916A.

In such a case the county court judge has no jurisdiction of the matter.<sup>96</sup> And no appeal lies to the court from the decision of a committee appointed under a scheme formed by the employer and accepted by the workman, where all the requirements of the act had been fulfilled, and the scheme provided that the committee had power to determine all claims arising under the scheme.<sup>97</sup> But the county court judge is not ousted if the scheme has not been properly certified.<sup>98</sup> And a minor who has assented to a duly certified contracting-out scheme is not bound to accept payment of amount given by such scheme if it is not beneficial to him.<sup>99</sup>

Where a scheme purports to be intended as a substitute for the act, the word "accident" in the scheme will be construed as having the same meaning as in the act, and to include disablement from disease described in § 8 of the act.<sup>1</sup>

The employer is not entitled to deduct from the workman's wages a contribution to a scheme of compensation where the original scheme to which the workman had consented had expired by lapse of time, and the new scheme certified by the registrar of friendly societies had not been agreed to by the workman.<sup>2</sup>

As to the recertifying of schemes under the act of 1897, so as to render them valid under the act of 1906, see post 128.

the chief registrar of friendly societies is outside the provisions of the act altogether. Horn v. Lords Comrs. of Admiralty [1911] 1 K. B. (Eng.) 24, 80 L. J. K. B. N. S. 278, 103 L. T. N. S. 614, 27 Times L. R. 84, 4 B. W. C. C. 1.

<sup>97</sup> Allen v. Great Eastern R. Co. [1914] 2 K. B. (Eng.) 243, 110 L. T. N. S. 498, [1914] W. N. 33, 83 L. J. K. B. N. S. 898, [1914] W. C. & Ins. Rep. 388.

<sup>98</sup> Where a duly certified scheme provided that the funds were to be managed in accordance with rules not inconsistent with the scheme, to be framed from time to time, which rules had not been certified, and it was found as a matter of fact that the rules were inconsistent with the scheme, the scheme, as modified by the rules, cannot be said to be a properly certified scheme. Moss v. Great Eastern R. Co. [1909] 2 K. B. (Eng.) 274, 78 L. J. K. B. N. S. 1048, 100 L. T. N. S. 747, 25 Times L. R. 466, 2 B. W. C. C. 168.

<sup>99</sup> Morter v. Great Eastern R. Co. (1908; C. C.) 126 L. T. Jo. (Eng.) 171, 2 B. W. C. C. 480.

<sup>1</sup> Leaf v. Furze (Div. Ct.) [[1914] 3 K. B. (Eng.) 1068, 83 L. J. K. B. N. S. 1822.

<sup>2</sup> Wilson v. Ocean Coal Co. (1905) 21 Times L. R. (Eng.) 621, affirming 21 Times L. R. 195.

## VI. Liability to servants of contractors (§ 4).

### a. Text of § 4.

Section 4. (1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution, by or under the contractor, of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed: Provided that, where the contract relates to threshing, plowing, or other agricultural work, and the contractor provides and uses machinery by mechanical power for the purpose of such work, he and he alone shall be liable under this act to pay compensation to any workman employed by him on such work.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such indemnity shall in default of agreement, be settled by arbitration under this act.

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this act from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on or in or about premises on which the principal has undertaken to execute the work, or which are otherwise under his control or management.

[Section 4 of the original act provided as follows:

Section 4. Where, in an employment to which this act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or L.R.A.1916A.

under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this act to those workmen in respect of any accident arising out of, and in the course of, their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which is payable to the workmen (whether under this act, or in respect of personal negligence or wilful act independently of this act) by such contractor, or would be so payable if such contractor were an employer to whom this act applies: Provided, that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.]

### b. In general.

The meaning of the word "undertakers," as used in this section, is discussed in connection with the cases discussing the meaning of the word as used in the factory act. See post, 209.

It is stated in respect to § 4 of the earlier act, and the statement applies equally well to this section of the present act, that it "contemplates the case of persons who, being undertakers in respect to a particular class of business, substitute for themselves a contractor to do some part of that business, and provides that the workmen of such a contractor shall have the same rights against such persons as they would have if they were employed by them."<sup>3</sup> The principal will not be held liable for compensation to a man who has no claim against the contractor.<sup>4</sup>

The act does not impose joint liability, so that an application for compensation from both the principal and the contractor will be dismissed;<sup>5</sup> and where

<sup>3</sup> Collins, L. J. in *Wrigley v. Bagley* [1901] 1 K. B. (Eng.) 780.

<sup>4</sup> *Marks v. Carne* [1909] 2 K. B. (Eng.) 516, 78 L. J. K. B. N. S. 853, 100 L. T. N. S. 950, 25 Times L. R. 620, 53 Sol. Jo. 561, 2 B. W. C. C. 186 (the workman was the son of the contractor, dwelling in the same house with him).

<sup>5</sup> The widow and children of a workman who was killed while working in the employment of a glass merchant, on the roof



a workman employed by a contractor was injured, and proceeded against the contractor, and recovered compensation, he could not thereafter proceed against the principal, although the contractor went bankrupt and his insurance company went into liquidation.<sup>6</sup>

A subcontractor is liable to indemnify the principal contractor under the provisions of § 4 of the act, where the latter has been obliged to pay compensation to one of the subcontractor's employees.<sup>7</sup>

*c. "In the course of or for the purposes of" the principal's "trade or business."*

The work of cleaning the boilers of one of their ships lying in a harbor, which work is left to independent contractors, is not undertaken by the ship-owners "in the course of or for the purposes of" their trade or business;<sup>8</sup> nor is the tarring on the outside of a tank used by chemical manufacturers in the course of or for the purpose of the trade or business of the manufacturers;<sup>9</sup> nor is the repairing of a house for his own

occupancy "in the course of or for the purposes" of the trade or business of a real estate agent.<sup>10</sup> And a company engaged in the manufacture of wood is not liable for compensation to a workman employed by a contractor to stack wood, where it appeared that the manufacturers never stacked the wood themselves, but always had it stacked by contract.<sup>11</sup> So, a painter employed casually as an agent to do work on the premises of his principal, who was a gentleman living in the country, without business, is not within the statute, since the employer does not carry on a "trade or business."<sup>12</sup>

The work of putting gravel on approaches to a level crossing, which has been ordered by the Board of Railroad Commissioners, is work for the purpose of the trade or business of the railway company, but is not "in the way of their trade or business."<sup>13</sup> But the repairing of the roof of buildings used as a store and as a granary has been held to be for the purposes of the trade of the occupant of the store or granary, so as

of a building occupied by a firm of wool manufacturers, cannot claim compensation from both, and an application for compensation from both will be dismissed. *Herd v. Summers* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 870.

<sup>6</sup> *Meier v. Dublin* [1912] 2 I. R. 129, [1913] W. C. & Ins. Rep. 30, 46 Ir. Law Times, 233, 6 B. W. C. C. 441.

<sup>7</sup> *Cooper v. Wright* [1902] A. C. (Eng.) 302, 71 L. J. K. B. N. S. 642, 86 L. T. N. S. 776, 18 Times L. R. 622, 4 W. C. C. 75, 51 Week. Rep. 12; *Wagstaff v. Perks* (1902) 51 Week. Rep. (Eng.) 210, 87 L. T. N. S. 558, 5 W. C. C. 110, 19 Times L. R. 112.

<sup>8</sup> *Spiers v. Elderslie S. S. Co.* [1909] S. C. 1259, 46 Scot. L. R. 893 (not one of the normal operations which form the ordinary business of a ship owner); *Luckwell v. Auchen Steam Shipping Co.* [1913] W. C. & Ins. Rep. (Eng.) 167, 108 L. T. N. S. 52, 12 Asp. Mar. L. Cas. 286, 6 B. W. C. C. 51.

<sup>9</sup> A firm of chemical manufacturers is not liable to pay compensation to a workman of a person who had contracted to tar the outside of tanks used by them in their business. *Zugg v. Cunningham* [1908] S. C. (Scot.) 827. Lord McLaren observed: "In the present circumstances I am unable to see that the work of tarring the building in question was work undertaken by the appellants, whose business is not the erection or repair of structures, but the manufacture of chemicals."

<sup>10</sup> Where a surveyor and real estate agent, who had been instructed to let a dwelling house by its owner, decided to take the house himself, and contracted to have the house repaired, as he was authorized to do by the owner, the contract L.R.A.1916A.

does not relate to work undertaken by the surveyor in the course of and for the purposes of his business. *Brine v. May* [1913] W. C. & Ins. Rep. (Eng.) 148, 6 B. W. C. C. 134.

<sup>11</sup> *Hockley v. West London Timber & Joinery Co.* [1914] 3 K. B. (Eng.) 1013, 83 L. J. K. B. N. S. 1520, [1914] W. N. 330, 58 Sol. Jo. 705.

<sup>12</sup> *Miles v. Dawe* [1915] W. C. & Ins. Rep. (Eng.) 29, 8 B. W. C. C. 225 (case arose under § 13).

<sup>13</sup> *Ringwood v. Kerr Bros.* (1914; Alberta) 7 B. W. C. C. 1056. With reference to § 6, paragraph 3, of the Alberta act, the court said: "Under this section, the principal, the railroad company in this case, would be liable for an injury to an employee of the contractor, when the contract is made 'in the course of or for the purposes of its trade or business, for the execution by or under the contractor, of the whole or any part of any work undertaken by the principal, which is in the way of the principal's trade or business.'" The court further said: "Now it seems quite clear that the placing of gravel at a highway crossing is not work in the way of a railway company's business, which is the operation of trains, and is not undertaken by the company within the meaning of the section." This decision seems to lay down a very strict construction of the statute. If the business of a railway company is merely the operation of trains, then any repair work done upon the track would not come within the purview of the statute. It certainly seems very difficult to distinguish between the work of placing gravel at a crossing and the ordinary track repairing which all railway companies have to perform.

to bring the workman within the protection of the act, although the employment was of a casual nature under § 13.<sup>14</sup> So, casual employment to lop off trees on a farm being carried on for profit is for the purpose of the farmer's trade or business.<sup>15</sup>

*d. Work "undertaken by the principal."*

Under § 4, it is not sufficient to say that the work done was for the purpose of the business; it must also be a part of the work undertaken by the principal.<sup>16</sup> A few cases have turned on the meaning of this phrase.<sup>17</sup>

*e. "Premises on which the principal has undertaken to execute the work."*

Under § 4, subsec. 4, a principal contracting to do certain work in connection with the paving of a street cannot

be held to have undertaken to execute the work on every street radiating from the place where the work was being done over which the subcontractor might be minded to take his cart in drawing away the refuse from the street where the paving was being done.<sup>18</sup>

*f. Work "ancillary or incidental" to the trade or business of the principal.*

The most notable change in § 4, as it appears in the act of 1906, is the omission of the second paragraph of the original act, which provided that the act was not applicable to any work "which is merely ancillary or incidental to" the trade or business carried on by the undertaker. The decisions as to the scope of the phrase quoted are not consistent.<sup>19</sup>

<sup>14</sup> The dependents of a laborer engaged to repair a roof of a house in which drapery, grocery, and hardware business is carried on, and who was killed while so employed, are entitled to compensation, since he was employed for the purpose of the trade. *Johnston v. Monasterevan General Store Co.* [1909] 2 I. R. 108, 42 Ir. Law Times, 268, 2 B. W. C. C. 183.

The work of putting tiles on the roof of a farmer's granary is for the purpose of the farmer's business. *Blyth v. Sewell* (1909; C. C.) 126 L. T. Jo. (Eng.) 552, 2 B. W. C. C. 476.

<sup>15</sup> *Cotter v. Johnson* (1911) 45 Ir. Law Times, 259, 5 B. W. C. C. 568.

<sup>16</sup> *Hockley v. West London Timber & Joinery Co.* [1914] 3 K. B. (Eng.) 1013, 83 L. J. K. B. N. S. 1520, [1914] W. N. 330, 58 Sol. Jo. 705.

<sup>17</sup> Where a farmer arranged with the applicant, a young lad, for the services of a threshing machine belonging to the latter's father, who was to be paid 20 s. out of 25 s., and in the course of the work the applicant was injured, he is not entitled to compensation, there being no "work undertaken by the principal." *Walsh v. Hayes* (1909) 43 Ir. Law Times, 114.

Where the respondents, who were green grocers, entered into a joint venture with a billiards saloon keeper for the erection of a skating rink as a speculation, and employed a contractor to do the part of the work, and the servant of the contractor was injured, it cannot be said that the work on which the applicant was employed was work "undertaken" by the respondents as principals within the meaning of § 4 of the act. *Skates v. Jones* [1910] 2 K. B. (Eng.) 903, 79 L. J. K. B. N. S. 1168, 103 L. T. N. S. 408, 26 Times L. R. 643, 3 B. W. C. C. 460.

The periodical overhauling and cleaning of a barge may be found not to be part of the business carried on and undertaken by

the barge owner. *Hayes v. Thompson* [1913] W. C. & Ins. Rep. (Eng.) 161, 6 B. W. C. C. 130.

The work of unloading sulphur from a barge, which was consigned to a firm of drug grinders, is not work undertaken by the drug grinders, where they declined to do this work themselves, as they had previously attempted it, and found that their own men were not suitable for such work. *Bobbey v. Crosbie* (1915) 84 L. J. K. B. N. S. (Eng.) 856, 112 L. T. N. S. 900, 8 B. W. C. C. 236.

A municipal corporation which purchased land for the extension of its market, and sold an old mill on the premises, to be torn down and carried away, is liable as undertaker to a workman employed by the purchaser of the mill, who was injured in the work of demolition. *Mulrooney v. Todd* [1909] 1 K. B. (Eng.) 165, 78 L. J. K. B. N. S. 145, 100 L. T. N. S. 99, 73 J. P. 73, 25 Times L. R. 103, 53 Sol. Jo. 99 [1908] W. N. 242.

A company who purchased a lighter in England, and engaged a man to navigate it to Cape Verd for them and to provide and pay for the crew, is liable for injuries to one of the latter during the voyage. *Dittmar v. The V. 593* [1909] 1 K. B. (Eng.) 389, 78 L. J. K. B. N. S. 523, 100 L. T. N. S. 212, 25 Times L. R. 188.

<sup>18</sup> *Andrews v. Andrews* [1908] 2 K. B. (Eng.) 567, 77 L. J. K. B. N. S. 974, 99 L. T. N. S. 214, 24 Times L. R. 709, 1 B. W. C. C. 264.

<sup>19</sup> The following operations have been held to be "merely ancillary" to the business of the defendant:

The erection of a station building for a railway company by a contractor. *Pearce v. London & S. W. R. Co.* [1900] 2 Q. B. (Eng.) 100, 69 L. J. Q. B. N. S. 683, 48 Week. Rep. 599, 82 L. T. N. S. 473, 16 Times L. R. 336.

The work of putting a new driving wheel



**VII. Bankruptcy or winding up of employer under contract with insurers (§ 5).**

*a. Text of § 5.*

Section 5. (1) Where any employer has entered into a contract with any insurers in respect of any liability under this act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the

workman may prove for the balance in the bankruptcy or liquidation.

(3) There shall be included among the debts which, under § 1 of the preferential payments in bankruptcy act 1888, and § 4 of the preferential payments in bankruptcy (Ireland) act, 1889, are, in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up, to be paid in priority to all other debts, the amount, not exceeding in any individual case £100, due in respect of any compensation the liability whereof accrued before the date of the receiving order or the date of the commencement of the winding up; and those acts and the preferential payments in bankruptcy amendment act, 1897 shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the first schedule to this act.

(4) In the case of the winding up of a company within the meaning of the stan-  
dard act 1887, such an amount as afore-

into a steam engine belonging to a cotton factory, where such work is done under contract by a firm of engineers. *Wrigley v. Bagley* [1901] 1 K. B. (Eng.) 780, 84 L. T. N. S. 415, 70 L. J. K. B. N. S. 538, 65 J. P. 372, 49 Week. Rep. 472, affirmed in [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

The fixing of an iron roof by a subcontractor for a builder, the evidence showing that this was no part of the latter's business. *Bush v. Hawes* [1902] 1 K. B. (Eng.) 216, 71 L. J. K. B. N. S. 68, 85 L. T. N. S. 507, 66 J. P. 260, 50 Week. Rep. 311.

The erection by a contractor of coal-hauling machinery at the power station of an electric railway company. *Brennan v. Dublin United Tramways Co.* [1900] 2 I. R. (Ir.) 241.

The erection by a contractor of a retaining wall to protect the track of a railway. *Dundee & A. Joint R. Co. v. Carlin* (1901) 3 Sc. Sess. Cas. 5th series, 843, 38 Scot. L. R. 635, 9 Scot. L. T. 55 (servant run over by train).

The work of a man employed by a window cleaning company, who was injured while cleaning the windows of the defendant, a firm of tailors. *Dempster v. Hunter* (1902) 4 Sc. Sess. Cas. 5th series, 580, 39 Scot. L. R. 395, 9 Scot. L. T. 450.

The following operations have been held not to be "merely ancillary" to the business of the defendant:

Work done by a subcontractor for a firm L.R.A.1916A.

of building contractors, who habitually made contracts for the demolition of old buildings on the site of which new ones were to be constructed. *Knight v. Cubitt* [1902] 1 K. B. (Eng.) 31, 50 Week. Rep. 113, 18 Times L. R. 26, 71 L. J. K. B. N. S. 65, 66 J. P. 52, 85 L. T. N. S. 526.

The erection of signals for a new railway siding by a contractor. *Burns v. North British R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 629, 37 Scot. L. R. 448, 7 Scot. L. T. 408 (workman was run over).

Work done in the course of his employment by a servant of a contractor for the collection and delivery of goods conveyed by a railway for a through rate. *Greenhill v. Caledonian R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 736, 37 Scot. L. R. 524, 7 Scot. L. T. 458 (servant injured while transferring a barrel from a lorry to a goods train).

Carting work done by the servant of a firm of contractor, who were under contract to do all the carting work in connection with a factory. *Bee v. Owens* (1900) 2 Sc. Sess. Cas. 5th series, 439, 37 Scot. L. R. 328, 7 Scot. L. T. 362 (factory owner held liable).

Work done by a carter in the employ of a railway company, while he was engaged in transporting the goods of the defendants, a firm of sausage makers, to a station on the railway. *McGovern v. Cooper* (1902) 4 Sc. Sess. Cas. 5th series, 249, 39 Scot. L. R. 102, 9 Scot. L. T. 270.

said, if the compensation is payable to a miner or the dependents of a miner, shall have the like priority as is conferred on wages of miners by § 9 of that act, and that section shall have effect accordingly.

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid.

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

[This section is merely an elaboration of § 5 of the original act.]

*b. Proceedings under this section.*

In the case of the winding up or bankruptcy of an employer who is insured, § 5 of the act gives the workman only the same right against the company that the employer had;<sup>20</sup> and if the rights of a member of a mutual insurance company have been legally terminated, the workman has no rights against the company.<sup>21</sup> An injured workman entitled to com-

pensation has no right against the estate of his bankrupt employer who has entered into a contract with an insurer as to liability under the compensation act, and the fact that the insurance company is also insolvent does not alter the situation.<sup>22</sup> Upon an employer's becoming bankrupt, the right which he has or his trustees in bankruptcy have against the insurance company are transferred to, and vested in, the workman, and the employer has lost his right of indemnity against the insurance company.<sup>23</sup> Where an injured employee of a colliery had been receiving compensation, and the assurance company in which the employers were insured consequently went into liquidation, and shortly after the colliery also went into liquidation, it was held that the employee was entitled to a sum equal to the annuity of his compensation after deducting 25 per cent in accordance with the assurance company act 1909, § 7, and the amount which the colliery had paid the workman before it went into liquidation was not to be deducted.<sup>24</sup>

Charges incurred in obtaining an award are not preferential debts within the meaning of § 5, subsec. 3.<sup>25</sup>

<sup>20</sup> In *King v. Phoenix Assur. Co.* [1910] 2 K. B. (Eng.) 666, 80 L. J. K. B. N. S. 44, 103 L. T. N. S. 53, 3 B. W. C. C. 442, where the policy of insurance contained a clause requiring disputes between the insurers and the employer to be submitted to arbitration, and there was a genuine dispute, it was held that an injured employee could not take proceedings in the county court to have compensation awarded from the company until the dispute had been submitted to arbitration and an award had been made.

An appeal lies to a divisional court from an order of a county judge giving a workman a charge upon moneys due from an insurer to the employer. *Kniveton v. Northern Employers' Mut. Indemnity Co.* [1902] 1 K. B. (Eng.) 880, 18 Times L. R. 504, 71 L. J. K. B. N. S. 588, 50 Week. Rep. 704, 86 L. T. N. S. 721; *Morris v. Northern Employers' Mut. Indemnity Co.* [1902] 2 K. B. (Eng.) 165, 71 L. J. K. B. N. S. 733, 66 J. P. 644, 50 Week. Rep. 545, 86 L. T. N. S. 748, 18 Times L. R. 635. In those cases the applications were held not to be maintainable; the reasons assigned being that the workmen were merely subrogated by the statute to the rights of the employers, and that, having regard to the circumstances involved and the terms of the contracts between the employers and the insurers, it was clear that, at the time when the applications were made, there was no fund in respect of which the insurers were liable to the employers.

<sup>21</sup> *Daff v. Midland Colliery Owners' Mut. Indemnity Co.* (1913; H. L.) 82 L. J. K. B. N. S. (Eng.) 1340, 109 L. T. N. S. 418, 29 L.R.A.1916A.

*Times L. R.* 730, 57 Sol. Jo. 773, [1913] W. N. 256, 6 B. W. C. C. 799.

<sup>22</sup> *Re Pethick* [1915] 1 Ch. (Eng.) 26, 84 L. J. Ch. N. S. 285, 112 L. T. N. S. 212, [1915] W. C. & Ins. Rep. 5, [1915] H. B. R. 59, [1914] W. N. 403, 59 Sol. Jo. 74. *Neville, J.*, took the position that the result of § 5 is to deprive a workman of his rights against his employer's estate where the latter had been insured, since all of the employer's rights against the insurer were transferred to the workman; and to hold otherwise, and say that the liability of the employer remains because it is not expressly released under the section would enable the workman to proceed against the employer, having, by the transfer of the employer's rights against the insurance company to himself, deprived the employer of the benefit of the contract that he has entered into with the insurer.

<sup>23</sup> The trustees in bankruptcy of the employer of an injured workman have no right to repayment from an insurance company of sums paid to the workman as compensation on account of his injury, since the rights of the employer have been transferred to the workman, and whatever may be the right of the workman, the employer has no longer any right to indemnity. *Craig v. Royal Ins. Co.* (1915; Div. Ct.) 84 L. J. K. B. N. S. (Eng.) 333, 112 L. T. N. S. 291, [1915] W. C. & Ins. Rep. 139, [1915] H. B. R. 57, [1914] W. N. 442.

<sup>24</sup> *Re Law Car & General Ins. Corp.* (1913) 110 L. T. N. S. (Eng.) 27, 58 Sol. Jo. 251.

<sup>25</sup> *Re Jinks* (1914; K. B. Div.) 137 L. T. Jo. (Eng.) 320.



Appeals from orders of the county court judge relative to payment to the workmen by insurance companies in which the bankrupt employer was insured lie to the divisional court, and not to the court of appeal;<sup>26</sup> and an appeal from the decision of the county court judge, awarding a lump sum to an injured workman against the receiver or liquidator of the employer, does not lie to the court of appeal.<sup>27</sup>

In the cases cited in the subjoined note, all of which arose out of the same transaction, the court discusses a number of questions involving § 6 of the British Columbia workmen's compensation act of 1902, which is similar to § 5 of the English act of 1897, with the exception that jurisdiction is given to a judge of the supreme court, instead of to the judge of the county court.<sup>28</sup>

**VIII. Liability of third person whose negligence causes the injury (§ 6).**

**a. Text of § 6.**

Section 6. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

(1) The workman may take proceedings both against that person to recover damages, and against any person liable to pay compensation under this act, for such compensation, but shall not be entitled to recover both damages and compensation; and

(2) If the workman has recovered compensation under this act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid; and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this act.

[Section 6 of the original act provided as follows:

[Section 6 of the original act provided compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this act, but not against both; and

<sup>26</sup> *Leech v. Life & Health Assur. Asso.* [1901] 1 K. B. (Eng.) 707, 70 L. J. K. B. N. S. 544, 84 L. T. N. S. 414, 17 Times L. R. 354, 49 Week. Rep. 482, 3 W. C. C. 202; *Kniveton v. Northern Employer's Mut. Indemnity Co. (Div. Ct.)* [1902] 1 K. B. (Eng.) 880, 71 L. J. K. B. N. S. 588, 86 L. T. N. S. 721, 50 Week. Rep. 704, 18 Times L. R. 504, 4 W. C. C. 37; *Morris v. Northern Employer's Mut. Indemnity Co.* [1902] 2 K. B. (Eng.) 165, 71 L. J. K. B. N. S. 733, 86 L. T. N. S. 748, 66 J. P. 644, 50 Week. Rep. 545, 18 Times L. R. 635, 4 W. C. C. 38.

<sup>27</sup> *Homer v. Gough* [1912] 2 K. B. (Eng.) 303, 81 L. J. K. B. N. S. 261, 105 L. T. N. S. 732, 5 B. W. C. C. 51.

<sup>28</sup> In *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 256, it is held that this provision of the act cannot be invoked, unless the insurer has admitted his liability, or has been found by a competent tribunal to be liable. In this case the insurer was proposing to contest his liability.

In *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 273, the application of the workman for an order that the employer and the insurers proceed to the trial of an issue with him was refused on the ground that any right which he might have against the insurers must be decided in an action commenced in the ordinary way.

In *Disourdi v. Sullivan Group Min. Co.* (1910) 15 B. C. 305, on the ground that L.R.A.1916A.

there was no privity of contract between the workman and the insurer of the employing company, it was held, after the company had become insolvent, that he could not, by any proceedings taken in his own name, establish the liability of the insurer to the company, and that the liability must be ascertained by the liquidator of the company. The decision of Macdonald, C. J. A., proceeded upon the ground that the liability of the insurer could not be ascertained in such an action as he was maintaining. "The creation of the charges alone, without reference to that part of the section which gives a remedy for enforcing it, effects the subrogation mentioned in the English cases." The view expressed by Irving, J. A., was that the liability of the insurers could be determined only in an action in which the liquidator of the insolvent company should be plaintiff. Martin, J. A., was of opinion that an action in the supreme court could not be deemed an application to a "judge of the supreme court," in the sense of the statutory provision.

In the same cases an action to obtain a declaration that the workman was entitled to a first charge on the moneys to which his employer was entitled, and for an order for payment, was held to have been rightly dismissed. The dismissal by the trial judge was rested on the ground that there was no privity of contract between the workman and the insurers.

if compensation be paid under this act, the employer shall be entitled to be indemnified by the said other person.]

**b. Joint liability of employer and third person.**

As to liability of third person whose negligence caused the injury under the American statutes, see post, 225.

The effect of § 6, subsec. 1 of the act, is that although an injured workman may proceed against either his employer or the person liable for damages, there cannot be a recovery both of compensation and of damages, and the recovery of one terminates the right to proceed for the other.<sup>29</sup> So a workman who has obtained an award for the payment of compensation cannot subsequently maintain an action against the third person whose negligence caused the accident.<sup>30</sup> And the father of a workman who for three years had received full compensation from his employers, and who subsequently died as the result of his injuries, cannot thereafter bring an action based on fault, against a third person

whose negligence was alleged to have caused the injury.<sup>31</sup> Where a workman in a colliery also carried on a small farm, and while occupied as a collier was injured by the negligence of a third person, and recovered compensation from his employer, he cannot thereafter bring an action for damages against the third party and recover damages for injuries which he has suffered as a farmer, although such damages were not included in the compensation.<sup>32</sup>

The acceptance of payments by the injured workman from a person other than the employer, who was alleged to be liable for negligence, although no action has been commenced and such liability is not admitted, precludes the workman, under § 6, subsec. 1, from obtaining compensation from the employer.<sup>33</sup> And the fact that a workman expressly reserves his right to compensation does not affect the result.<sup>34</sup> But a servant who, having received one payment under the act without qualification, which payment was offered voluntarily by the employer, refused to sign any

<sup>29</sup> Where a workman made no claim and took no proceedings under the act, but merely reported the accident in the ordinary way, and was informed that he was entitled to compensation, and afterwards received the maximum amount payable under the act, he will be deemed to have "recovered" compensation, and will be barred from proceeding against the person liable in damages for his injury. *Mahomed v. Maunsell* (1907; C. C.) 124 L. T. Jo. (Eng.) 153, 1 B. W. C. C. 269.

<sup>30</sup> *Tong v. Great Northern R. Co.* (1902; Div. Ct.) 86 L. T. N. S. (Eng.) 802, 66 J. P. 667, 18 Times L. R. 566.

<sup>31</sup> *Gray v. North Britain R. Co.* (1914) 52 Scot. L. R. 144, 8 B. W. C. C. 373.

<sup>32</sup> *Woodecock v. London & N. W. R. Co.* [1913] 3 K. B. (Eng.) 139, 82 L. J. K. B. N. S. 921, 109 L. T. N. S. 253, 29 Times L. R. 566, [1913] W. N. 179, [1913] W. C. & Ins. Rep. 563, 6 B. W. C. C. 471. This action was brought in the divisional court. Rowlatt, J., said: "The right to recover damages in respect of a personal injury is one indivisible right, and when the statute says the workman is not entitled to recover damages,—unless it divides the right to recover damages,—it must mean that he is barred of his remedy for any common-law damages which flow from the injury which he has traced to the negligence of the defendants. I do not think that the statute allows any other than that interpretation. The present case involves a curious position. It is not without its hardship to the plaintiff, but I am bound to say that I do not see any ground for doubting that in law he must fail in the claim which he makes against the railroad company."

L.R.A.1916A.

<sup>33</sup> A workman is precluded from obtaining compensation from his employer under the act, when he has made a claim for compensation against a person other than his employer, alleged to be liable for negligence, and has received various payments in satisfaction of his claim, although he has not resorted to legal proceedings and no legal liability is admitted. *Page v. Burtwell* [1908] 2 K. B. (Eng.) 758, 77 L. J. K. B. N. S. 1061, 99 L. T. N. S. 542.

<sup>34</sup> Where an injured workman has made a claim for damages at common law against a person other than his employers, and, without having taken legal proceedings, has received a payment in settlement of his claim, he is barred from claiming compensation against his employers; and this result is not prevented by a clause in the receipt given by him, reserving a right to claim compensation from his employers. *Mulligan v. Dick* (1903) 6 Sc. Sess. Cas. 5th series, 126, 41 Scot. L. R. 77, 11 Scot. L. T. 433.

A workman in the employment of carting contractors, who was injured while employed under a contract between the contractors and a railway company, and who, under reservation of all claims he might have for compensation against other parties, asked for and accepted from the contractors a payment in full of all claims against them, under any statute or at common law, in respect of the injury, is barred by the terms of § 6 from thereafter claiming compensation under the act from the undertakers. *Murray v. North British R. Co.* (1904) 6 Sc. Sess. Cas. 5th series, 540, 41 Scot. L. R. 383, 11 Scot. L. T. 746.



other receipt except subject to the reservation "without prejudice," subject to which other payments were received, has not exercised the option referred to in § 6 so as to preclude him from proceeding against the other person liable for the injury.<sup>35</sup> And a workman injured by the neglect of a third person, who received compensation from the employer, expressly reserving his right against the third person, and agreeing that if he recovers damages he will reimburse the employer for the amount of compensation received from him, has not "recovered compensation" so as to preclude him from proceeding against the third person in damages.<sup>36</sup>

<sup>35</sup> *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 K. B. (Eng.) 639, 72 L. J. K. B. N. S. 857, 89 L. T. N. S. 318, 19 Times L. R. 697, 52 Week. Rep. 200, 9 Asp. Mar. L. Cas. 436.

<sup>36</sup> *Wright v. Lindsay* [1912] S. C. 189, 49 Scot. L. R. 210, 5 B. W. C. C. 531. The lord justice clerk said: "Now, the question in the circumstances of this case is, whether the pursuer has so 'recovered' compensation that he is barred from proceeding in his action. Looking to the arrangement made it appears to me that what the pursuer has received is not compensation recovered under the act. It is of the nature of a sum advanced by the employers under conditions which exclude the idea of its being a final acceptance of compensation under the act. The arrangement is in every sense reasonable and humane. The employer knows that if his servant cannot get damages from the alleged wrongdoer, he must provide compensation. But, as the litigation for damages is a long and protracted proceeding, he arranges with the workman, 'I will give you now what corresponds to what would be my liability, so that you may be supported, but you must engage to me to return me what I advance if you are successful in getting the fuller compensation from the wrongdoer.' I am of opinion that payments made under such an arrangement are no bar to action at law." Lord Salvesen said: "Where a payment is made by an employer to his workman on the footing that he shall be entitled to recover damages at common law against third parties, and that the sums which the employer has disbursed are to be repaid out of any damages which he may so recover, I think the case is entirely different. The compensation so paid is in the nature of an advance by the employer for the maintenance of the pursuer pending proceedings to make good his claim, and is only accepted as in full of the workman's right under the act against his employer in the event of his claim against the third party being unsuccessful. I cannot think that it was ever intended that the act should make ineffectual an arrangement of this kind, *emil* L.R.A.1916A.

### c. *Employer's right to indemnity from third person.*

The employer is entitled to indemnity against any third person whose negligence causes injury to his workman, for which injury the employer is obliged to pay compensation,<sup>37</sup> including fellow workmen of the injured employee.<sup>38</sup> But he cannot maintain an action for indemnity against third persons whose negligence combined with that of his own servants to produce the injury.<sup>39</sup> And no indemnity is recoverable from a third person, where such person is in no wise liable to the workman.<sup>40</sup>

The phrase "creating a legal liability

is not reasonably from the point of view of both workman and employer and in the interests of both."

<sup>37</sup> *Dickson v. Scott* [1914] W. C. & Ins. Rep. (Eng.) 67, 30 Times L. R. 256, 7 B. W. C. C. 1007.

In *Daily News v. McNamara* (1913) 7 B. W. C. C. (Eng.) 11, an employer recovered a judgment in a divisional court for the full amount of compensation which he was obliged to pay to the widow of a deceased workman, from a third person whose negligence caused the death of the workman.

<sup>38</sup> Fellow workmen through whose negligence another workman is injured are included in the words "some person other than the employer," and are liable for the indemnity provided for in § 6. *Lees v. Dunkerley Bros.* (1910) 103 L. T. N. S. (Eng.) 467, 55 Sol. Jo. 44. And see *Bate v. Worsey* [1912] W. C. Rep. (Eng.) 194, 5 B. W. C. C. 276.

<sup>39</sup> *Cory v. France* [1911] 1 K. B. (Eng.) 114, 80 L. J. K. B. N. S. 341, 103 L. T. N. S. 649, 27 Times L. R. 18, 55 Sol. Jo. 10, 11 Asp. Mar. L. Cas. 499.

<sup>40</sup> A firm of stevedores is not entitled to be indemnified by a colliery company for the compensation which they are compelled to pay to one of their workmen on account of injuries received by him, caused by the brakes on one of the company's wagons being insufficient to control the wagon as it was returned down a gradient up which it had been drawn in order to be emptied in the vessel, the company not being responsible for the unusual strain to which the brakes were put in descending the gradient, which was greater than the wagons were subjected to while employed on the company's own business. *Kemp v. Dargavil Coal Co.* [1909] S. C. 1314, 46 Scot. L. R. 939; *Caledonian R. Co. v. Warwick* (1897) 25 R. (H. L.) 1, 35 Scot. L. R. 54, followed. *Elliott v. Hall* (1885) L. R. 15 Q. B. Div. (Eng.) 315, 54 L. J. Q. B. N. S. 518, 34 Week. Rep. 16, distinguished. Lord Pearson observed: "The accident happened during the time when the haulage contract was suspended, and during the fulfilment of the contract of loading, to which

ty" does not mean that the court must determine judicially that there is a legal liability; it is sufficient that such liability is alleged.<sup>41</sup> Compensation paid by the employer after receiving notice of the accident and of the claim, but before any other proceedings had been taken, may be recovered by the employer from the "other person."<sup>42</sup>

An employer who has paid compensation for the death of an employee may recover indemnity from the person whose negligence caused the injury, although the dependent to whom the compensation was paid was an illegitimate daughter and would not of herself have any cause of action against the negligent person.<sup>43</sup>

In an action in rem against a German vessel brought by the owners of an Irish vessel injured by a collision between the two, the owners of the latter vessel cannot include in damages the amount paid a seaman for compensation for injuries for fright before the collision took place.<sup>44</sup> An employer is entitled to recover as indemnity the costs of the compensation proceedings, as well as the compensation awarded.<sup>45</sup> Where the employer seeks indemnity against a third person whose negligence caused the in-

jury for which the employer is liable for compensation, the court of appeal will not interfere if there is some evidence to support the finding that the third person was guilty of negligence.<sup>46</sup>

In an action for indemnity under the act, notice under rule 19 must be served, although the defendant was a party to the compensation proceedings.<sup>47</sup> But an employer may, if he chooses, bring an action for indemnity under § 6, subsec. 2, independently of the general rules as to third party procedure.<sup>48</sup>

#### IX. Application to workmen in the sea service (§ 7).

##### a. Text of § 7.

Section 7 (1) This act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United King-

dom, the defendants were not parties, and with which they have no concern."

An employer who has paid compensation to a servant who was kicked by a horse belonging to a third person whose servant brought the horse upon the employer's premises and left it there unattended cannot recover contribution against the third person, since the negligence of such third person cannot be considered the natural and proximate cause of the injury to the employer's servant. *Bradley v. Wallaces* [1913] 3 K. B. (Eng.) 629, 82 L. J. K. B. N. S. 1074, 109 L. T. N. S. 281, 29 Times L. R. 705, [1913] W. N. 239, [1913] W. C. & Ins. Rep. 620, 6 B. W. C. C. 706.

Driving a motor car with a defective hooter is not such negligence as to render the driver liable to indemnify the employer of the driver of a cart whose horse was frightened by the motor car, where the county court judge found that the absence of a proper hooter was not the cause of the accident. *Lankester v. Miller-Hetherington* (1910) 4 B. W. C. C. (Eng.) 80.

<sup>41</sup> *Page v. Burtwell* [1908] 2 K. B. (Eng.) 758, 77 L. J. K. B. N. S. 1061, 99 L. T. N. S. 542, 125 L. T. Jo. 336, 1 B. W. C. C. 267.

<sup>42</sup> *Thompson v. North Eastern Marine Engineering Co.* [1903] 1 K. B. (Eng.) 428, 72 L. J. K. B. N. S. 222, 88 L. T. N. S. 239, 19 Times L. R. 206.

<sup>43</sup> *Smith's Dock Co. v. Readhead* [1912] 2 K. B. (Eng.) 323, 81 L. J. K. B. N. S. 808, 106 L. T. N. S. 843, 28 Times L. R. L.R.A.1916A.

397, [1912] W. C. Rep. 217, 5 B. W. C. C. 449.

<sup>44</sup> *The Rigel* (1912; Adm.) 106 L. T. N. S. (Eng.) 648, [1912] W. N. 56, 28 Times L. R. 251, 12 Asp. Mar. L. Cas. 192, L. R. [1912] P. 99, 81 L. J. Prob. N. S. 86.

<sup>45</sup> *Great Northern R. Co. v. Whitehead* (1902) 18 Times L. R. (Eng.) 816.

<sup>46</sup> *Cutsforth v. Johnson* [1913] W. C. & Ins. Rep. (Eng.) 131, 6 B. W. C. C. 28, 108 L. T. N. S. 138.

<sup>47</sup> *Howard v. Driver* (1903) 5 W. C. C. (Eng.) 153.

Where both the undertakers and a contractor with them are made respondents to a claim for compensation under the act, and the contractor is found liable to pay compensation, a claim for indemnity cannot be made in the arbitration by the undertakers against the contractor under rule 23 (2) of the workmen's compensation rules 1898, unless the notice prescribed by rule 19 has been given. *Appleby v. Horseley Co.* [1899] 2 Q. B. (Eng.) 521, 80 L. T. N. S. 853, 68 L. J. Q. B. N. S. 892, 47 Week. Rep. 614, 15 Times L. R. 410.

<sup>48</sup> *Nettleingham v. Powell* [1913] 3 K. B. (Eng.) 209, 82 L. J. K. B. N. S. 911, 108 L. T. N. S. 912, 29 Times L. R. 578, 57 Sol. Jo. 593, [1913] W. N. 182, [1913] W. C. & Ins. Rep. 424, 6 B. W. C. C. 479, affirming the divisional court [1913] 1 K. B. (Eng.) 113, [1912] W. N. 278, 82 L. J. K. B. N. S. 54, 108 L. T. N. S. 219, 29 Times L. R. 88, 6 B. W. C. C. 262.



dom, subject to the following modifications:—

(a) The notice of accident and claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident;

(b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant;

(c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, deposition respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the board of trade, and such depositions or certified copies thereof shall, in any proceedings for enforcing the claim, be admissible in evidence as provided by §§ 691 and 695 of the merchant shipping act 1894, and those sections shall apply accordingly;

(d) In the case of the death of a master, seaman, or apprentice, leaving no dependents, no compensation shall be payable, if the owner of the ship is, under the merchant shipping act 1894, liable to pay the expenses of burial;

(e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the merchant shipping act 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice;

(f) Any sum payable by way of compensation by the owner of a ship under this act shall be paid in full, notwithstanding anything in § 503 of the mer-

chant shipping act 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this act relating to remedies both against employer and stranger, as if the indemnity were damages for loss of life or personal injury;

(g) Subsections (2) and (3) of § 174 of the merchant shipping act 1894 (which relates to the recovery of wages of seamen lost with their ship) shall apply as respects proceedings for the recovery of compensation by dependents of masters, seamen, and apprentices lost with their ships as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands:

(2) This act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

(3) This section shall extend to pilots to whom part X. of the merchant shipping act 1894 applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

[This section is entirely new.]

#### *b. Proceedings under this section in general.*

The act has no application outside of the territorial limits of the United Kingdom except as it is expressly given in § 7.<sup>49</sup> And this section does not apply unless the ship is registered in the United Kingdom.<sup>50</sup>

The county court judge or other arbitrator has no jurisdiction over an application for compensation to an appren-

<sup>49</sup> A firm of English contractors are not liable for compensation in respect to the death of a workman engaged in working for them in the island of Malta. *Tomalin v. Pearson* [1909] 2 K. B. (Eng.) 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1.

A workman lost in the Bay of Biscay while on his way to work at Teneriffe is not within the act. *Schwartz v. India Rubber, Gutta Percha & Teleg. Works Co.* [1912] 2 K. B. (Eng.) 299, [1912] W. N. 98, 28 Times L. R. 331, 81 L. J. K. B. N. S. 780, [1912] W. C. Rep. 190, 106 L. T. N. S. 706, 5 B. W. C. C. 390. L.R.A.1916A.

A charwoman taken by a French woman to do work for her in France, and injured while in that country, is not within the purview of the act, where there is nothing to show that the parties intended their contract to be controlled by the *lex loci contractus*. *Hicks v. Maxton* (1907; C. C.) 124 L. T. Jo. (Eng.) 135, 1 B. W. C. C. 150.

<sup>50</sup> Where the registration of a ship was canceled a few days before she sailed, with a view to the sale of the ship to foreigners, a seaman who sailed on the ship is not within the protection of the act. *Mortimer v. Wisker* [1914] 3 K. B. (Eng.) 699, 30

tee who was serving on board a ship, where the articles of apprenticeship are still running.<sup>51</sup> Payments made to an injured seaman under the merchant shipping acts are not to be regarded in fixing compensation to be paid subsequently to the period during which the shipowner is liable under such acts for the expenses and maintenance of the injured seaman, as § 7 (1) (e) is intended only to prevent the overlapping of the two acts.<sup>52</sup> But if the shipowners are not liable for the hospital expenses paid by them, such expenses must be regarded in fixing the amount of compensation.<sup>53</sup>

The lapse of twelve months during which a ship has not been heard of (after which, under § 174 of the merchant shipping act 1894, she is deemed

to have been lost with all hands) is not a condition precedent to a claim for compensation under the workmen's compensation act, where, by the ordinary rules of evidence, a seaman would be deemed to have been lost at sea with his ship.<sup>54</sup>

*c. Persons in sea service excluded from § 7 (§ 7, subsec. 2).*

It is clear that a member of the crew of a fishing vessel who receives as his remuneration a share of the profits of the catch is excluded from the provisions of the act.<sup>55</sup> And notwithstanding he receives a regular weekly wage, he is not within the statute, if he also receives a share of the profits.<sup>56</sup> But it has been held that in cases where the share of the

Times L. R. 592, [1914] W. N. 281, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1245, 111 L. T. N. S. 732, 7 B. W. C. C. 494.

<sup>51</sup> *Turner v. The Haulwen* [1915] W. C. & Ins. Rep. (Eng.) 50, 8 B. W. C. C. 242. This decision was based on the express terms of § 7 (1) (d), that the weekly payments shall not be payable in respect of a period during which the owner of a ship is liable to defray the expense of the maintenance of the injured apprentice.

<sup>52</sup> No deduction ought to be made from the amount of compensation to an injured seaman, in respect to the cost of maintenance in a foreign hospital, for which the shipowners are liable under the merchant shipping acts, where he asks for compensation only from the date of his return to England. *McDermott v. The Tintoretto* [1910] W. N. (Eng.) 274, 55 Sol. Jo. 124 [1911] A. C. 35, 80 L. J. K. B. N. S. 161, 103 L. T. N. S. 769, 27 Times L. R. 149, 11 Asp. Mar. L. Cas. 515, 4 B. W. C. C. 123, 48 Scot. L. R. 728.

<sup>53</sup> *Kempson v. The Moss Rose* (1910) 4 B. W. C. C. (Eng.) 101. This decision was rendered prior to the decision of the House of Lords in *McDermott v. The Tintoretto* (Eng.), which reversed the court of appeal in the position which that court had taken. However, it would appear that the cases are fundamentally different, and that the decision of the House of Lords is not necessarily conclusive of the case at bar.

<sup>54</sup> *Maginn v. Carlingford Lough S. S. Co.* (1909) 43 Ir. Law Times, 123.

<sup>55</sup> The mate or first fisherman of a steam-trawler, whose sole remuneration was a certain proportion of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew, is within the exception of § 7, subsec. 2. *Gill v. Aberdeen Steam Trawling & Fishing Co.* [1908] S. C. (Scot.) 328.

An engineer upon a steam fishing boat, who was paid by a share in the profits upon a guaranty that they should never amount to less than a certain sum, is excluded. *L.R.A.1916A.*

cepted from the provisions of the act. *Admiral Fishing Co. v. Robinson* [1910] 1 K. B. (Eng.) 540, 79 L. J. K. B. N. S. 551, 102 L. T. N. S. 203, 26 Times L. R. 299, 54 Sol. Jo. 305, 3 B. W. C. C. 247.

A "share-hand" on a trawler is not entitled to compensation for injuries, although he was at the time engaged in work on one of the employer's steam cutters for which he received a fixed sum. *Whelan v. Great Northern Steam Shipping Co.* [1909] W. N. (Eng.) 135, 78 L. J. K. B. N. S. 860, 100 L. T. N. S. 913, 25 Times L. R. 619.

Members of fishing crews, who receive sleeping room and provision and a certain wage per week, and a further share on the net profits of the voyage, are members of the crew of a fishing vessel remunerated by shares in the profit of the working of such vessel within § 7, subdiv. 2, of the act. *Tindall v. Great Northern S. S. Fishing Co.* (1912) 56 Sol. Jo. (Eng.) 720, 5 B. W. C. C. 667.

<sup>56</sup> A boatswain on a steam fishing trawler, who was remunerated by maintenance and poundage, dependent upon the profits of the fishing expedition, is excluded from the act by § 7, subsec. 2, although he also received wages. *Costello v. The Pigeon* [1913] A. C. (Eng.) 407, 82 L. J. K. B. N. S. 873, 108 L. T. N. S. 927, 29 Times L. R. 595, 57 Sol. Jo. 609, [1913] W. N. 187, 50 Scot. L. R. 976, [1913] W. C. & Ins. Rep. 410, 6 B. W. C. C. 480.

Members of a crew of a fishing vessel, who received in addition to their regular wages a share of stocker, which is money received from the sale of the tails of fish, roes, shellfish, etc., and liver money, which is a share of the proceeds of the livers cleaned from the fish, received a part of the gross earnings of the working of the vessel, and are not entitled to compensation for injuries under § 7, subdiv. 2, of the act. *Burman v. Zodiac Steam Fishing Co.* [1914] 3 K. B. (Eng.) 1039, 30 Times L. R. 651, 83 L. J. K. B. N. S. 1683, [1914] W. N. 329, 7 B. W. C. C. 767.

If a member of the crew of a fishing ves-



profits made by the fisherman is so small as to be negligible, the county court judge may find that he is not remunerated by a share of the gross profits, so as to be excluded from the statute.<sup>57</sup>

**A flatboat engaged in carrying barrels of fish from the fishing station to vessels, and empty barrels back from the vessels to the station, is not a fishing boat within § 7, subsec. 2, of the act, so as to exclude a workman on the boat who received a share of the profits from the protection of the statute.**<sup>58</sup>

#### **X. Compensation for industrial diseases ( § 8, Sched. III.).**

##### **a. Text of act relative thereto.**

##### **1. Text of § 8.**

Section 8 (1) Where—

(i) the certifying surgeon appointed under the factory and workshop act 1901 for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this act, and is thereby disabled from earning full wages at the work at which he was employed; or—

(ii) A workman is, in pursuance of any special rules or regulations made under the factory and workshop act 1901, suspended from his usual employment on account of having contracted any such disease; or—

(iii) The death of a workman is caused by any such disease; and the disease is due to the nature of any employ-

ment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependents shall be entitled to compensation under this act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

ment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependents shall be entitled to compensation under this act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

(a) The disablement or suspension shall be treated as the happening of the accident;

(b) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable;

(c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

Provided that—

(i) The workman or his dependents, if so required, shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the

sel, as a matter of fact, received a share of the money received from the sale of fish tails, roes, shellfish, etc., and of the liver money, he received a share of the gross earnings of the vessel, although in the running agreement such as is required by the merchants shipping act 1894, § 400, the column in the agreement headed "Share of fishing profits" was struck through in the space opposite the applicant's name to show that it did not apply to him. Ibid.

A deck hand on board a steam trawler, who was paid weekly wages and received in addition a share of "stocker" or inedible fish, was "remunerated by a share in the profits or gross earnings," and his dependents are not entitled to compensation for his death, although at the time that the vessel was lost with all on board, no stocker had been taken. Stephenson v. Rossall Steam Fishing Co (1915) 84 L. J. K. B. N. S. (Eng.) 677, 112 L. T. N. S. 891, [1915] W. C. & Ins. Rep. 121, [1915] W. N. 70, 8 B. W. C. C. 209.

Although the written contract of employment of a deck hand on a fishing vessel stated only that the remuneration was to be 20s. a week and board and lodging, it L.R.A.1916A.

may nevertheless be inferred that he was to receive a share of the stocker or inedible fish, where, by the custom of the port, a deck hand was entitled to such shares, and the hand in question had received a share of the stocker upon the preceding trip. Ibid.

The decision of the House of Lords in Costello v. The Pigeon (Eng.) must be considered as overruling the decision of the court of session, in which it was held that a member of a fishing crew who was paid a weekly wage and received in addition a certain sum per pound sterling on the gross value of the fish was not remunerated by a share of the profits or gross earnings, so as to be excluded from the benefits of the act. Colquhoun v. Woolfe [1912] S. C. 1190, 49 Scot. L. R. 911, [1912] W. C. Rep. 343.

<sup>57</sup> Williams v. The Duncan [1914] 3 K. B. (Eng.) 1039, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767; McCord v. The City of Liverpool [1914] 3 K. B. (Eng.) 1037, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767.

<sup>58</sup> Jamieson v. Clark (1909) 46 Scot. L. R. 73, [1909] S. C. 132, 2 B. W. C. C. 228.

workman was in his employment shall not be liable to pay compensation; and—

(ii) If that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration; and if the allegation is proved, that other employer shall be the employer from whom the compensation is to be recoverable; and—

(iii) If the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this act for settling the amount of the compensation;

(d) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable;

(e) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment.

(f) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final.

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the third schedule to this act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

(3) The Secretary of State may make rules regulating the duties and fees of

certifying and other surgeons (including dentists) under this section.

(4) For the purpose of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—

(a) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine:

(b) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under this section, and this section shall be construed accordingly.

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order, not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.

(7) Where, after inquiry held on the application of any employers or workmen engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or society, and that the company or society consents, the Secretary of State may, by provisional order, require all employers in that industry to insure in the company or society upon such terms and under such conditions and subject to such exceptions as may be set forth in the order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry.

(8) A provisional order made under



this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the bill confirming any such order is pending in either House of Parliament, a petition is presented against the order, the bill may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private bills, and any act confirming any provisional order under this section may be repealed, altered, or amended by a provisional order made and confirmed in like manner.

(9) Any expenses incurred by the Secretary of State in respect of any such order, provisional order, or confirming bill shall be defrayed out of moneys provided by Parliament.

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this act.

[This section is new, and enlarges materially the scope of the act.]

## 2. Text of third schedule.

The third schedule, mentioned in § 8 of the act, is given below.

### DESCRIPTION OF DISEASE AND PROCESS.

Anthrax—Handling of wool, hair, bristles, hides, and skins.

Lead poisoning or its sequelæ—Any process involving the use of lead or its preparations or compounds.

Mercury poisoning or its sequelæ—Any process involving the use of mercury or its preparations or compounds.

Phosphorus poisoning or its sequelæ—Any process involving the use of phosphorus or its preparations or compounds.

Arsenic poisoning or its sequelæ—Any process involving the use of arsenic or its preparations or compounds.

Ankylostomiasis—Mining.

Where regulations or special rules made under any act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then, in the application of this schedule to that industry, the expression "process" shall, unless the Secretary of State otherwise directs, include only the processes so specified.

## b. In general.

Apart from § 8, the act has no operation except where there is an accident,<sup>59</sup> and this section does not have a retroactive effect,<sup>60</sup> and cannot apply to seamen contracting industrial diseases while at sea.<sup>61</sup>

There can be no recovery under § 8 unless it is established that the employment caused the disease,<sup>62</sup> and that the disease caused the workman's death or

<sup>59</sup> If there has been no accident, the workman's right to compensation, if any, must be based on § 8 of the act. *Chuter v. Ford* [1915] 2 K. B. (Eng.) 113, 84 L. J. K. B. N. S. 703, [1915] W. C. & Ins. Rep. 104, [1915] W. N. 53, 31 Times L. R. 187, 8 B. W. C. C. 160.

<sup>60</sup> In *Greenhill v. The Daily Record* (1909. Ct. of Sess.) 46 Scot. L. R. 483, the court refused to entertain a claim made by the widow of a workman who had left his employment before the date when the act came into force, and had died after it took effect, from an "industrial disease" to which it was applicable.

<sup>61</sup> *Curtis v. Black* [1909] 2 K. B. (Eng.) 529, 78 L. J. K. B. N. S. 1022, 100 L. T. N. S. 977, 25 Times L. R. 621, 53 Sol. Jo. 576. *Cozens-Hardy, M. R.*, observed that a workman who had contracted an industrial disease, lead poisoning in this case, in order to make a claim, must procure a certificate from the certifying surgeon appointed under the factory and workshop act "for the district in which he is employed;" there can be no such surgeon where the disease was contracted at sea.

<sup>62</sup> It is not enough for the applicant to L.R.A.1916A.

prove that the deceased employee had been employed in a lead process within twelve months, and that he died of lead poisoning; it must be shown that the disease was caused by the employment. *Dean v. Rubian Art Pottery Co.* [1914] 2 K. B. (Eng.) 213, 83 L. J. K. B. N. S. 799, 110 L. T. N. S. 594, 30 Times L. R. 283, 58 Sol. Jo. 302, [1914] W. N. 45, [1914] W. C. & Ins. Rep. 147, 7 B. W. C. C. 209.

Compensation cannot be allowed where there is no evidence that the workman's tendency to an industrial disease was due to a previous attack of the disease while in the employment of the master, as opposed to a physical susceptibility to the disease. *Jones v. New Brynmally Colliery Co.* [1912] W. C. Rep. (Eng.) 281, 5 B. W. C. C. 375, 106 L. T. N. S. 524.

Where a medical referee has certified that a miner was suffering from nystagmus, but that it was not due to mining, the sheriff substitute must allow the matter to go on so that the workman may show if he can that the disease of nystagmus, from which he is certified to be suffering, really arose from his employment, and did not arise from other causes. *McGinn v. Udston Coal Co.* [1912] S. C. 668, 49

disability;<sup>63</sup> and the workman has the burden of proof of showing that the liability to a recurrence of the disease is due to the accident, and not to a constitutional predisposition to the particular disease.<sup>64</sup>

The certificate of a certifying surgeon that a workman is suffering from an industrial disease does not require to be obtained before the initiation of proceedings, but may be obtained and produced in the course of the proceedings;<sup>65</sup> and the date at which the certifying surgeon finds the workman to have been disabled may be subsequent to the time of the termination of the workman's employment with the employers.<sup>66</sup>

In the absence of a contract of employment there can be no liability for contribution under § 8;<sup>67</sup> but a workman is not necessarily barred from compensation because he falsely stated in his application for employment that he had not used white lead when employed by other persons, where it appeared that the employer was not prejudiced thereby in securing contribution from the other employers.<sup>68</sup>

*c. Meaning of phrase "at or immediately before."*

The phrase "immediately before" as used in § 8, subsec. 2, refers to a sequence of time, not to a sequence of employment. Consequently, a miner who leaves the employment of the mine owner for a reason not connected with the disease cannot procure compensation up-

on the ground that eight months after he left the employment he was disabled by nystagmus.<sup>69</sup> So, where a workman had worked for a few days in an employment involving the use of lead, and after leaving the employment caught cold and died of pneumonia about a month after he had left the employment, the employment was not "at or immediately before," the death, within the meaning of § 8 subsec. 2.<sup>70</sup>

*d. Presumption as to cause of disease.*

The presumption referred to in § 8, subsec. 2, is that the disablement was due to the nature of the scheduled employment irrespective of the date or place at which the disease was contracted.<sup>71</sup>

A workman engaged as a surface laborer at a colliery is not entitled to a statutory presumption that the disease of nystagmus, from which he is suffering, was due to the nature of the employment.<sup>72</sup>

*e. Contribution by other employers.*

Compensation for an industrial disease is recoverable in the first instance from the employer who had last employed the workman during the period, however short that period of employment may have been.<sup>73</sup> In seeking contribution from prior employers, there is no obligation on the part of the employers to prove that the disease was contracted while the claimant was in the service of the previous employers.<sup>74</sup>

Under § 8, subsec. 1 (c) (iii), the ar-

Scot. L. R. 531, [1912] W. C. Rep. 134, 5 B. W. C. C. 559.

<sup>63</sup> Haylett v. Vigor [1908] 2 K. B. (Eng.) 837, 77 L. J. K. B. N. S. 1132, 24 Times L. R. 885, 72 Sol. Jo. 741, 99 L. T. N. S. 74.

<sup>64</sup> Darroll v. Glasgow Iron & Steel Co. [1913] S. C. 387, 50 Scot. L. R. 226, [1913] W. C. & Ins. Rep. 80, 6 B. W. C. C. 354.

<sup>65</sup> Taylor v. Burnham [1909] S. C. 704, 46 Scot. L. R. 482.

<sup>66</sup> Russell v. Keary (1915) 52 Scot. L. R. 447, 8 B. W. C. C. 410.

<sup>67</sup> Pears v. Gibbons [1913] W. C. & Ins. Rep. (Eng.) 469, 6 B. W. C. C. 722.

<sup>68</sup> Taylor v. Burnham [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. C. C. 569.

<sup>69</sup> M'Taggart v. Barr (1914) 52 Scot. L. R. 125, 8 B. W. C. C. 376.

<sup>70</sup> An employment which terminated on April 19th cannot be said to have been employment "at or immediately before" May 15th. Dean v. Rubian Art Pottery Co. [1914] 2 K. B. (Eng.) 213, 83 L. J. K. B. N. S. 799, 110 L. T. N. S. 594, 30 Times L. R. 283, 58 Sol. Jo. 302, [1914] W. N. 45, [1914] W. C. & Ins. Rep. 147, 7 B. W. C. C. 209.  
L.R.A.1916A.

<sup>71</sup> Glancy v. Watson (1915) 52 Scot. L. R. 279, [1915] W. C. & Ins. Rep. 40, 8 B. W. C. C. 391.

<sup>72</sup> Scullion v. Cadzow Coal Co. [1914] S. C. 36, [1913] 2 Scot. L. T. 271, 51 Scot. L. R. 39, [1914] W. C. & Ins. Rep. 129, 7 B. W. C. C. 833. The basis of this decision was that the expression "the process of mining" was not equivalent to the expression "employment on, in, or about a mine," and that if the legislature had intended that the statutory presumption should apply in the case of a surface worker, the latter phrase would have been used in the statute.

<sup>73</sup> Merry v. McGowan (1914) 52 Scot. L. R. 30, 8 B. W. C. C. 344. In this case, the miner had been in the last employment but two days.

<sup>74</sup> Where, upon an application for compensation by an employee who was suffering from mercurial poisoning, the employers disputed their liability on the ground that the disease was not contracted in their service, and served third-party notices on other employers, claiming contribution from them in respect of compensation on the ground that the disease was of such a



bitrator must determine what, under all the facts of the case, is a fair and proper contribution for the former employers to make to the compensation which the last employer had to pay, and he is not to limit himself to merely calculating the number of days during which the man was in the respective employments,<sup>75</sup> unless there is no special circumstance to show that the disease had in reality been greatly accelerated by the conduct of some particular employer.<sup>76</sup>

A builder's laborer who had contracted eczematous ulceration from contact with cement and lime while in the employment of the respondent, and who was voluntarily paid compensation for the time he was disabled, cannot, over a year thereafter, when he is in the employment of other employers and the disease reappears, recover compensation from the

nature as to be contracted by gradual process, and that the workman had been employed by the other employers within twelve months of his disablement, the defendant employers need not allege that the disease had been actually contracted at any particular date, or prove that it was contracted while the claimant was in the service of the previous employers. *Mallinder v. Moores* [1912] 2 K. B. (Eng.) 124, 81 L. J. K. B. N. S. 714, 106 L. T. N. S. 487, [1912] W. C. Rep. 257, [1912] W. N. 97, 5 B. W. C. C. 362. The ground of this decision was that the county court judge had misdirected himself in that he considered the case to fall within § 8 (1) (c) (ii), which applies where the employer claims that the disease was wholly contracted in another employment. The disease, mercurial poisoning, was within the provisions of § 8 (1) (c) (iii), and the employment with the third person had been within the twelve months.

<sup>75</sup> In *Barron v. Seaton Burn Coal Co.* [1915] 1 K. B. (Eng.) 756, 112 L. T. N. S. 897, 31 Times L. R. 199, 84 L. J. K. B. N. S. 682, [1915] W. C. & Ins. Rep. 132, [1915] W. N. 70, 59 Sol. Jo. 315, 8 B. W. C. C. 218, the court of appeal allowed an appeal from an award of the county court judge in the case of a miner who was suffering from nystagmus, and who, during the twelve months preceding the award, had worked for five different employers engaged in mining. The county court judge ordered each of the five employers to contribute in proportion to the period during which the man was employed with them. One of the employers claimed that the working arrangements at his colliery were so good and so far superior to those of the other collieries that it was not right that the other employers should bear simply a ratable proportion of the total sum, having regard only to the number of days or weeks in which the man was employed at their colliery. The county court judge, however, was of the opinion that the provision in L.R.A.1916A.

respondent, there being no suspensory agreement, and no suspensory award.<sup>77</sup>

#### *f. Functions of certifying surgeons and medical referees.*

The sole function of the certifying surgeon, and of the medical referee on appeal, is to determine whether the workman is suffering from a scheduled disease, and is thereby disabled from earning full wages in his employment, and, subject to the provisions of § 8, subsec. 4, to fix the date on which disablement commenced.<sup>78</sup> A certificate by the medical referee allowing an appeal by the workman from the refusal of the certifying surgeon to give the workman a certificate of disablement in respect of a disease falling within the statute, and fixing the date of the disablement, is conclusive.<sup>79</sup> But the county court

question was intended to obviate the necessity of making such inquiries in the case of a disease acquired gradually. The court of appeal, however, took the contrary view.

<sup>76</sup> *Lees v. Waring* (1909 C. C.) 127 L. T. Jo. (Eng.) 498, 2 B. W. C. C. 474.

<sup>77</sup> *Timpson v. Mowlem* (1915) 112 L. T. N. S. (Eng.) 885, 8 B. W. C. C. 178. The court pointed out that the workman should have proceeded against his last employers, and that they had power to call in the respondent and make out, if they could, that the industrial disease was really contracted when the workman was in the respondent's employ, and not while in the employment of the last employers.

<sup>78</sup> The sheriff as arbitrator should refuse to accept the report of a medical referee to whom the matter was referred under § 8 (1) (f), where the latter, subject to a note appended, dismissed the appeal. *Winters v. Addie & Sons' Collieries* [1911] S. C. 1174, 48 Scot. L. R. 940.

A medical referee to whom a case is referred under § 8 (1) (f) of the act has no power to dismiss an appeal by the employers from an award, with the restriction that the applicant "is now able to resume his ordinary work." *Garrett v. Waddell* [1911] S. C. 1168, 48 Scot. L. R. 937.

Where a certifying surgeon had given a certificate that a workman was suffering from an industrial disease, but in the certificate fixed the commencement of the disablement at the time of the examination, which, under the circumstances of the case, prevented the workman from taking proceedings for compensation under the act, the workman is aggrieved under § 8 subsec. 1 (iii) (f), and has a right of appeal to the medical referee. *Birks v. Stafford Coal & I. Co.* [1913] 3 K. B. (Eng.) 686, 109 L. T. N. S. 290, 82 L. J. K. B. N. S. 1334, [1913] W. N. 238, 57 Sol. Jo. 729, 6 B. W. C. C. 617.

<sup>79</sup> *Chuter v. Ford* [1915] 2 K. B. (Eng.) 113, 84 L. J. K. B. N. S. 703, [1915] W. C.

judge is entitled to ignore a certificate of a certifying surgeon to the effect that a bookbinder was suffering from lead poisoning, but that there were none of the usual symptoms, and that the disease could only be inferred from the man's history of the case.<sup>80</sup> A medical referee should not sit with the county court judge as assessor upon an issue upon which he had already given his opinion as medical referee.<sup>81</sup>

#### ***XI. Application to workmen under the Crown (§ 9).***

##### ***a. Text of § 9.***

Section 9 (1) This act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this act would apply if the employer were a private person:

Provided, that in the case of a person employed in the private service of the Crown, the head of that department of the Royal Household in which he was employed at the time of the accident shall be deemed to be his employer.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this act their warrant made under § 1 of the superannuation act 1887, and, notwithstanding anything in that act, or any such warrant, may frame schemes with a view to their being certified by the registrar of friendly societies under this act.

[This section is the same as § 8 of the original act, except that the proviso in subsec. 1 is new.]

#### ***XII. Appointment and remuneration of arbitrators and medical referees (§ 10).***

##### ***a. Text of § 10.***

Section 10 (1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purpose of this act as he may, with the sanction of the Treasury, determine, and the remuneration of, and other expenses incurred by, medical ref-

erees under this act shall, subject to regulations made by the Treasury, be paid out of moneys provided by Parliament.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman, or by any insurers interested, he shall not act as medical referee in that case.

(2) The remuneration of an arbitrator appointed by a judge of county courts under the second schedule to this act shall be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury [new.]

#### ***XIII. Detention of ships whose owners are liable for compensation (§ 11).***

##### ***a. Text of § 11.***

Section 11 (1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this act, and at any time that ship is found in any port or river of England or Ireland, or within 3 miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him, by any person applying in accordance with the rules of the court, that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge, requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings they may be instituted to recover such compensation, and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3) Section 692 of the merchant shipping act 1894 shall apply to the detention of a ship under this act as it applies to the detention of a ship under that act and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected [new].

& Ins. Rep. 104, [1915] W. N. 53, 31 Times L. R. 187, 8 B. W. C. C. 160. It was further held that the certificate of the medical referee was not irregular and invalid by reason of the omission of the statement that the workman was disabled by the disease from earning full wages at the work at which he was employed.

<sup>80</sup> Mapp v. Straker [1914] W. C. & Ins. Rep. (Eng.) 98, 7 B. W. C. C. 18.

<sup>81</sup> Wallis v. Soutter [1915] W. N. (Eng.) 68, 59 Sol. Jo. 285, [1915] W. C. & Ins. Rep. 113, 8 B. W. C. C. 130. L.R.A.1916A.



*b. Proceedings under this section.*

An appeal from an order of the county court judge detaining a vessel under § 11 lies to the provisional court, and not to the court of appeal.<sup>82</sup>

*XIV. Reports of injuries (§ 12).**a. Text of § 12.*

Section 12 (1) Every employer in any industry to which the Secretary of State may direct that this action shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as the Secretary of State may direct, and in default of complying with this section shall be liable, on conviction under the summary jurisdiction acts, to a fine not exceeding £5.

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made [new].

*XV. Definition clauses (§ 13).**a. Text of § 13.*

Section 13. In this act, unless the context otherwise requires,—

"Employer" includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person;

"Workman" does not include any person employed otherwise than by way of manual labor whose remuneration exceeds £250 a year, or a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any per-

son who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labor, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing;

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom or for whose benefit compensation is payable;

"Dependents" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively;

"Member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister;

"Ship," "vessel," "seaman," and "port" have the same meanings as in the merchant shipping act 1894;

"Manager," in relation to a ship, means the ship's husband or other person to whom the management of the ship is intrusted by or on behalf of the owner;

"Police force" means a police force to which the police act 1890, or the police (Scotland) act 1890, applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force;

"Outworker" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles;

The exercise and performance of the powers and duties of a local or other public authority shall, for the purpose of this act, be treated as the trade or business of the authority;

"County court," "judge of the county court," "registrar of the county court," "plaintiff," and "rules of court," as respects Scotland, mean respectively sher-

<sup>82</sup> Panagotis v. The Pontiac [1912] 1 K. B. (Eng.) 74 [1911] W. N. 221, 28 Times L. R. 63, 56 Sol. Jo. 71. L.R.A.1916A.

iff court, sheriff, sheriff clerk, pursuer, and act of sederunt.

[Section 13 takes the place of subsec. 2 of § 7 of the act of 1897, but contains the definition of a number of terms not used in the earlier act.]

*b. Who are "employers."*

For American Cases defining this term, see post, 245.

Public bodies may be employers; such as the central body constituted under § 1 of the unemployed workmen act 1905, which has provided temporary work for a workman;<sup>83</sup> and the word "employer" covers the Sydney Harbor Trust Commissioners.<sup>84</sup> An infant employer is liable as any other employer under the workman's compensation act of 1908.<sup>85</sup>

The owners of a ship may be found to be the "employers," of a workman employed in weighing a cargo, although he had been selected from the list of weighers appointed and licensed under statutory authority, where it appeared that

he was subject to the control and direction of the ship foreman, who, if dissatisfied with his services, could stop the work and send for another.<sup>86</sup>

A workman who has been receiving compensation may, upon the death of the employer, and the neglect or refusal of the next of kin to take out letters, secure the appointment of an administrator so as to be able to enforce his right to compensation, since the workman cannot be deprived of compensation merely because there is no one standing in the position of "employer."<sup>87</sup>

In the general law of master and servant, the question frequently arises as to which of two persons is the employer of a workman who is admittedly a servant of one of them. Cases of this character, involving compensation, will be found in the note; but it is to be noted that the decisions turn on principles entirely independent of the compensation act.<sup>88</sup>

The court will not interfere with the

<sup>83</sup> Porton v. Central (Unemployed) Body for London [1908] W. N. (Eng.) 242, 25 Times L. R. 102; Gilroy v. Makie [1909] S. C. 466, 46 Scot. L. R. 325.

<sup>84</sup> Re Ryan (1911) 11 New South Wales St. Rep. 33.

<sup>85</sup> Re Smith (1911) 17 West L. Rep. (Can.) 550.

<sup>86</sup> Wilmerson v. Lynn & H. S. S. Co. [1913] 3 K. B. 931, (Eng.) 82 L. J. K. B. N. S. 1064, 109 L. T. N. S. 53, 29 Times L. R. 652, 57 Sol. Jo. 700, [1913] W. C. & Ins. Rep. 633, 6 B. W. C. C. 542.

<sup>87</sup> Re Byrne (1910; Prob.) 44 Ir. Law Times, 98, 3 B. W. C. C. 591.

<sup>88</sup> The owners of a threshing machine are the employers of a man employed by them as a road man to go along the road ahead of the thresher, but who when the machine is at work acts as trusser, and is paid by the farmer, and was so at work when injured. Reed v. Smith (1910) 3 B. W. C. C. (Eng.) 223.

A coal trimmer, although employed by an agent of the harbor commissioners, is in the employment of a firm of shipping agents who act as managers of a vessel being loaded with coal for third persons, where the trimmers are directly under the control of the agents, and are paid from the freight, the balance of which, less charges, is sent by the agents to the owners of the vessel. Gorman v. Gibson [1909-10] S. C. 317, 47 Scot. L. R. 394.

Shipowners may be found to be the employers of a workman employed to assist in mooring ships, although he was engaged and paid by a stevedore, where it appears that the owners gave the money to the stevedore instead of to the workman as a matter of convenience. Pollard v. Goole & H. Steam Towing Co. (1910) 3 B. W. C. C. (Eng.) 360.

Where an agreement between the owners L.R.A.1916A.

of a vessel and the skipper provided that the skipper was to work the vessel on the best paying trade, receiving for his services two thirds of all the freight earned, out of which he was to pay all the wages for the crew, and all other expenses connected with the working of the vessel, remitting to the owner the remaining one third, and it further provided that if he had cause to give up command of the vessel, he was to advise the owner, and, if requested, to bring the vessel to certain ports free of all charges to the owner, and further provided for his leaving the vessel at a loading port, a mate employed by the skipper, who would get his full wages whether the vessel earned any freight or not, may be found to be under a contract of service with the owners. Kelly v. The Miss Evans [1913] 2 I. R. 385, 47 Ir. Law Times, 155, [1913] W. C. & Ins. Rep. 418, 6 B. W. C. C. 916.

The mate of a vessel may be found to be in the employment of the owners where, by the contract between them and the captain, the latter made all contracts for freight, and engaged the crew, and took the vessel where he wished, and the owners paid the wages of the crew if the freight was not sufficient therefor, and tonnage and pilotage expense were deducted from the gross freights, and the captain took two thirds of the residue, paying thereout all other expenses. The Victoria v. Barlow (1911) 45 Ir. Law Times, 260, 5 B. W. C. C. 570.

A member of the gang engaged in unloading sulphur from a barge is not an employee of the owner of the sulphur, where he engaged one of the gang to supply the labor necessary, and that one engaged the others and supplied the necessary tools, and the money received was divided equally among the gang, except that the leader received two pennies from each of the others,



decision of the county judge upon questions of pure fact, such as whether the respondent was the employer of the applicant.<sup>89</sup>

*c. "Contract of service."*

The determination of the question

the owner merely directing where the sulphur should be placed. *Bobby v. Crosbie* (1915) 84 L. J. K. B. N. S. (Eng.) 856, 112 L. T. N. S. 900, 8 B. W. C. C. 236.

Where a mandatory hires workmen in his own name, without disclosing his principal, and pays them with his own money or check, he is liable for any compensation to which they may be entitled because of injuries received while in such employment. *Demers v. McCrae* (1911) Rap. Jud. Québec, 40 S. C. 123.

<sup>89</sup> *Pollard v. Goole & H. Steam Towing Co.* (Eng.) supra (respondents held to be employers of applicant).

<sup>90</sup> A workman who was injured while at work in the labor yard of a charitable organization, having applied there for aid, had no "contract of service." *Burns v. Manchester & S. Wesleyan Mission* (1908) 99 L. T. N. S. (Eng.) 579, 125 L. T. Jo. 336, 1 B. W. C. C. 305.

There is no contract of service between a dispensary medical officer and the board of poor law guardians, who appoint him to perform the statutory duties of his office. *Murphy v. Enniscorthy Guardians* [1908] 2 I. R. 609, 42 Ir. Law Times, 246, 2 B. W. C. C. 291.

There is no contract of service where a taxicab driver takes a cab from the owner's yard by the day, and pays over 75 per cent of the daily receipts to the owners, and retains 25 per cent, less the price of his petrol. *Doggett v. Waterloo Taxi-Cab Co.* [1910] 2 K. B. (Eng.) 336, 102 L. T. N. S. 874, 79 L. J. K. B. N. S. 1085, 26 Times L. R. 491, 54 Sol. Jo. 541, 3 B. W. C. C. 371; *Bates-Smith v. General Motor Cab Co.* [1911] A. C. (Eng.) 188, 80 L. J. K. B. N. S. 839, 27 Times L. R. 370, 4 B. W. C. C. 249.

A continuing contract within the meaning of § 13 does not exist between a farmer and a laborer who worked by the day, and came and went as he pleased, and who occasionally absented himself without notice, so as to render the farmer liable to compensation, where, when the workman presented himself for work on the morning of the day on which he was injured, he was told by the farmer that another farmer had asked him to lend him a man, and that the workman was to go and aid the second farmer in threshing operations, which he did, incurring during such employment the injuries of which he died. *Boswell v. Gilbert* (1909) 127 L. T. Jo. (Eng.) 146, 2 B. W. C. C. 251.

There is no contract of employment between a farmer and a quarryman who sometimes assisted the farmer in getting in his crops in the evening, and who received L.R.A.1916A.

whether a contract of service exists between the workman and the respondents depends upon general principles, rather than upon the construction of the compensation act. There can be no compensation unless such a contract does exist.<sup>90</sup> Nor, in the absence of such a contract, is

no money for his services, but the farmer gave him beer and sometimes a supper when the work was over, since, if this was a contract of employment, it would have been illegal under the truck act, and could not constitute a "contract of service" within the meaning of § 13 of the workmen's compensation act. *Kemp v. Lewis* [1914] 3 K. B. (Eng.) 543, [1914] W. N. 264, 137 L. T. Jo. 213, 83 L. J. K. B. N. S. 1535, 111 L. T. N. S. 699, 7 B. W. C. C. 422.

A letter fixer has a contract of service with a firm of enamel letter makers where he frequently obtained work from them, and was in the habit of calling regularly at their place of business and occasionally canvassed among shopkeepers to fix letters in behalf of the firm, and was paid by them in respect to the orders he received. *Taylor v. Burnham* [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. C. C. 569.

Where a firm of fish curers entered into a contract with a man whereby they were to furnish him with a flit boat of which the man was to be skipper and was to employ a helper, and the flit boat was to be engaged in carrying barrels of fish from the fish stations to vessels, and empty barrels back, both for the owners and for other curers, the gross profits of the work to be divided into three parts, one for the owners and one for each of the men, and when there was no work of this character the owners were, so far as possible, to furnish other work on shore for the men, the contract was one of employment, and not of partnership. *Jamieson v. Clark* (1909) 46 Scot. L. R. 73, [1909] S. C. 132, 2 B. W. C. C. 228.

Where a workman engaged in quarrying stone had a partner with whom he shared the money earned, and they employed and paid five or six men to work with them, and were paid a certain sum per ton for every ton of ordinary stone, and an extra payment for every ton of building stone, and the quarry owner's manager could terminate the contract with him at any time by giving him reasonable notice, but had no power to dismiss the men employed by him, except by terminating the agreement, and the workman could work what hours he pleased, and was not obliged to work at all provided a sufficient amount of stone was sent out, but had to obey the orders of respondent manager as to the place where he was to work or kind of stone he was to send out if such orders were given, and all the tools used by the party were the property of the quarry owners, and the horse also belonged to the quarry owners, but the workman had to look after it and provide it with food, the county court judge may find that the workman was under a con-

the employer liable under § 8 to contributions to subsequent employers.<sup>90a</sup>

*d. Who are "workmen."*

*1. In general.*

For American decision defining this term, see post, 246.

Under the definition clause of the workman's compensation act 1897, the term "workman" included every person who was engaged in an employment to which the act applied, "whether by way of manual labor or otherwise." This description "made it possible for a man to be a workman within the meaning of the act, although he might not be engaged in manual labor,"<sup>91</sup> but it was deemed to be applicable only to those classes of employees whose remuneration could properly be designated as "wages." In this point of view it was

held in one case that the certificated manager of a coal mine, who was paid a yearly salary, and who, although his duties required his presence in the mine, was not required to engage in manual labor, was not a "workman."<sup>92</sup> In another case a graduate in science, who had entered the employment of a dye and chemical manufacturing company, under a written agreement for five years' service, and upon terms with regard to salary, commission on profits of inventions or improvements in manufacturing discovered by him, restrictions as to employment after the termination of his engagement, and disclosure of matters relating to the business of the company and his own researches, was declared not to be a "workman," although his employment involved manual labor on his part.<sup>93</sup>

tract of service within the meaning of the act. *Jones v. Penwyllt Dinas Silica Brick Co.* [1913] W. C. & Ins. Rep. (Eng.) 394, 6 B. W. C. C. 492.

An old man employed by another workman, who was authorized only to employ a boy, is not in the employment of the employer. *McClelland v. Todd* (1909; Recorder's Ct.) 43 Ir. Law Times, 75, 2 B. W. C. C. 472.

In the absence of evidence to show an express hiring, a contract of employment will not be presumed between a hop grower and a girl of seventeen, who accompanied and assisted her aunt in picking hops for the grower, where it was the custom for the heads of family, when engaged in picking hops, to take the entire family with them. *Richards v. Pitt* (1915) 84 L. J. K. B. N. S. (Eng.) 1417.

The county court judge may find that there is no contract of service between the captain of a canal boat and the owners, where he was working under a system whereby he took two thirds of the gross receipts of voyages in one direction, and three quarters in the other, paying for all labor and current expenses out of his portion, and he had power to refuse any cargo offered by the owners as unremunerative, and on the voyage the boat was absolutely under his control. *Beck v. Hill & Sons*, (1915) 8 B. W. C. C. (Eng.) 592.

See also the cases cited in note 14, *infra*.

<sup>90a</sup> A coach builder who, after the appointment of a trustee to wind up the business, was appointed by the trustee to help in the winding up, and spend about half an hour every day helping the trustee in supervising the workmen, paying their wages and keeping a day book, is not under a contract of service with the trustee, so as to render the latter liable to contribution under § 8 (1) (c) (iii.) to a coach painter for whom the coach builder was working when he contracted lead poisoning. *Pears v. Gibbons* [1913] W. C. & Ins. Rep. (Eng.) 469, 6 B. W. C. C. 722.  
L.R.A.1916A.

<sup>91</sup> *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* [1905] 1 K. B. (Eng.) 453, 74 L. J. K. B. N. S. 347, 53 Week. Rep. 390, 92 L. T. N. S. 282, 21 Times L. R. 209.

<sup>92</sup> *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* (Eng.) *supra*. Collins, M. R., said: "The popular meaning must be given to a definition where we are confronted with such an expression as 'wages,' and we must interpret the act as applying to persons whom, *ex hypothesi*, the legislature regards as not being in a position to protect themselves. None of these considerations apply to the case of a person holding the position of a certificated manager of a colliery, who comes within a very different category from that of an ordinary workman. I do not say that a person in the position of the deceased is absolutely excluded from the possibility of coming within the act, for it is possible that such a man might in fact work as a workman, though I do not know that such a contingency is at all probable; there might, however, be facts in a particular case from which the conclusion might be drawn that, although the man was a certificated manager, he was also a workman."

<sup>93</sup> *Bagnall v. Levinstein* [1907] 1 K. B. (Eng.) 531, 76 L. J. K. B. N. S. 234, 96 L. T. N. S. 184, 23 Times L. R. 165. The position of Collins, M. R., and Cozens-Hardy, L. J., was that the governing factor in determining whether the man was a workman within the meaning of the act was the question what he was employed to do; and that the judge misdirected himself by not taking into consideration the terms of the employment as disclosed in the agreement, and in treating the performance of manual labor in the discharge of his duties as conclusive that the man was a workman within the meaning of the act. The master of the rolls remarked: "The root of the matter is that each case must be decided in view of that which the person whom it is sought to treat as a workman was employed to do. The learned judge has not dealt quite fairly with the argument as to this man being a



Under the definition clause of the existing act of 1906 (§ 13), certain classes of employees are expressly excluded from the scope of the term "workman," and with these exceptions the term means "any person who has entered or works under a contract of service or apprenticeship with an employer, whether by way of manual labor, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

Under this clause a skilled music teacher is not a workman.<sup>94</sup> Neither is a person who, at an exhibition of an airship,

master of science. It is true that a person of that description may be employed as a workman, but the governing factor is whether he was employed as a master of science, to get the benefit of his attainments; and if the true inference from the facts is that this was the main purpose of the employment, the case is not *prima facie* one of employment as a workman, even though the man has to do some manual labor in putting himself in a position to give, his skilled service. The case of *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* (Eng.) supra, reaffirms the position that the popular meaning must be given to the term 'workman,' and to call a skilled expert a workman is to travel out of the ordinary meaning of that term." Farwell, L. J., dissented on grounds which were thus forcibly stated: "In the present case there is an agreement in writing for service by a man who is a skilled workman. I should be loath to say that education is a bar to success in a claim for compensation under the act. In my view the consideration whether the applicant is a gentleman, or whether his education is good or bad, is not relevant. The case does not, in my opinion, turn so much on the construction of the agreement, though that is an important matter to consider, as on the work that was done by the deceased under it. In the agreement the undertaking of the deceased to obey all orders of those in authority in such work as might be allotted to him is put in the forefront of the matter. . . . Under this agreement the man might be employed in such a way as to be a mere workman, or he might be something more, and which he was must depend on the event. If he had been found sufficiently skilful to be employed in the laboratory, he might have been withdrawn from manual labor; but this, as appears from the evidence of the manager, was not the case. That evidence is that when the man was disabled a foreman did his work, and that he had done no research work during the whole time that he was there; for certainly five sixths of his time he was working as an ordinary though skilled workman. The hours that he worked and the salary that he received appear to me to make no difference, and there is in my opinion nothing in the terms L.R.A.1916A.

is engaged to explain the various parts of the machine and the exploits of the operator.<sup>95</sup> And a salesman is not a workman under the Manitoba statute.<sup>96</sup>

But a law writer is a workman within the English act.<sup>97</sup> So is a professional football player who had entered into a written agreement to serve the defendants for one year at a weekly wage, by playing football when required, with the team of the club, to attend regularly the training and general instruction, and not to engage himself to play football for any other person or club during the stipulated term.<sup>98</sup> And a man employed

of the agreement which overrides the fact that the man was doing, for the greater part of the time, work which would be done by an ordinary workman."

<sup>94</sup> *Simmons v. Heath Laundry Co.* [1910] 1 K. B. (Eng.) 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 Times L. R. 326, 54 Sol. Jo. 392, 3 B. W. C. 200. Cozens-Hardy, M. R., said that there might be a contract for services, but not a contract for service.

<sup>95</sup> *Waites v. Franco-British Exhibition* (1909) 25 Times L. R. (Eng.) 441.

<sup>96</sup> *Hewitt v. Hudson's Bay Co.* (1910) 20 Manitoba L. Rep. 126, 15 West. L. Rep. (Can.) 372.

<sup>97</sup> *McKrell v. Howard* (1909) 2 B. W. C. C. (Eng.) 460.

<sup>98</sup> *Walker v. Crystal Palace Football Club* [1910] 1 K. B. (Eng.) 87, 79 L. J. K. B. N. S. 229, 101 L. T. N. S. 645, 26 Times L. R. 71, 54 Sol. Jo. 65, 3 B. W. C. C. 53, Ann. Cas. 1913C, 25. Cozens-Hardy, M. R., and Fletcher Moulton, L. J., were of opinion that the contract was one "by way of manual labor," and that it certainly came under the more general words "or otherwise." Farwell, L. J., thus discussed the two points made by the defendants. "The appellants have made two points. They first of all say there is no contract of service with an employer, because the football player is at liberty to exercise his own initiative in playing the game. That appears to me to be no answer. There are many employments in which the workman exercises initiative, but he may or may not be bound to obey the directions of his employer when given to him. If he has no duty to obey them, it may very well be that there is no service, but here not only is the agreement by the player that he will serve, but he also agrees to obey the training and general instructions of the club. I cannot doubt that he is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game,—that is to say, any direction that is within the terms of his employment as a football player. The other point taken is that he is not a 'workman' within the act. It appears to me that it is impossible for the court to consider the practical utility of the service or

on temporary work by a distress committee under the unemployed workmen's act of 1905.<sup>90</sup> And a blind man who, upon entering an institution for the blind, stipulated that he would give his services for what they were worth, and in return receive board, lodging, and clothing, and 5 shillings a month in money.<sup>1</sup>

The statute expressly provides that the term workman does not include a member of the employer's family, dwelling in his house,<sup>2</sup> nor a member of the police force.<sup>3</sup>

Workmen engaged in lumbering operations are not within the provisions of the Quebec act.<sup>4</sup>

The licensed driver of a taxicab, who pays a certain per cent of the earnings

to the owner, is a bailee, and not a workman.<sup>5</sup>

One member of a partnership is not entitled to compensation for injuries received while working for the partnership.<sup>6</sup> But a person who owns ten sixty-fourths shares of a trading vessel, and who is employed as master by the managing owner, is entitled to compensation when injured in the course of his employment.<sup>7</sup> So, a man does not cease to be a workman within the meaning of the act merely because his remuneration is a share of the profits;<sup>8</sup> and payment by a percentage of the gross earnings does not of itself indicate partnership;<sup>9</sup> but the facts may be such as to show that the man was a co-adventurer, and not a workman.<sup>10</sup>

work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby, it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is therefore necessarily excluded from the definition of workman within the meaning of the act. I put, during the argument, the case of the huntsman and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it."

<sup>90</sup> *Gilroy v. Mackie* [1909] S. C. (Scot.) 466, 2 B. W. C. C. 269. Lord Duneden said: "A pauper may be compelled to work in a poorhouse, or a prisoner in prison, by force of statute. There is, therefore, entirely wanting that freedom of contract on both sides which is of the essence of employment as we are using the term 'employment' in the sense of the act before us. But I am afraid that the difference here is that there is just the question of freedom. The unemployed need not go and ask for work unless he likes, and he need not take the work offered unless the terms suit him. If he does take the work, I think he becomes employed."

<sup>1</sup> *MacGillivray v. Northern Counties Institute* [1911] S. C. 897, 48 Scot. L. R. 811, 4 B. W. C. C. 429.

<sup>2</sup> A son twenty-six years of age, who is employed by his father, lives with him, and pays him for his board and lodging, is a member of the father's family, dwelling in his house, and is not a workman. *MDougall v. MDougall* [1911] S. C. 426, 48 Scot. L. R. 315, 4 B. W. C. C. 373.

A son living in the same house with his father, and employed by him to aid in carrying out a contract, cannot recover from the principal, since he could not recover from the contractor, his father, under the definition of workman contained in § 13 of L.R.A.1916A.

the act. *Marks v. Carne* [1909] 2 K. B. (Eng.) 516, 78 L. J. K. B. N. S. 853, 100 L. T. N. S. 950, 25 Times L. R. 620, 53 Sol. Jo. 561, 2 B. W. C. C. 186.

<sup>3</sup> *Sudell v. Blackburn Corp.* (1910) 3 B. W. C. C. (Eng.) 227.

<sup>4</sup> *Provost v. St. Gabriel Lumber Co.* (1910) 12 Quebec Pr. Rep. 285; *Duquette v. Lake Megantic Pulp Co.* (1911) 12 Quebec Pr. Rep. 359; *Novice v. E. B. Eddy Co.* (1911) 12 Quebec Pr. Rep. 319.

<sup>5</sup> *Smith v. General Motor Cab Co.* [1911] A. C. (Eng.) 188, 80 L. J. K. B. N. S. 839, 105 L. T. N. S. 113, 27 Times L. R. 370, 55 Sol. Jo. 439, 4 B. W. C. C. 249, 1 N. C. C. A. 576.

<sup>6</sup> *Ellis v. Ellis* [1905] 1 K. B. (Eng.) 324, 74 L. J. K. B. N. S. 229, 53 Week. Rep. 311, 92 L. T. N. S. 718, 21 Times L. R. 182.

<sup>7</sup> *Sharpe v. Carswell* [1910] S. C. 391, 47 Scot. L. R. 335, 3 B. W. C. C. 552.

<sup>8</sup> A contract of service exists between the owner of a sailing barge and the master, where the owner fixed the rates and directed to what dock it was to be taken, although his remuneration consisted of a half share of the profits, out of which he was to engage a mate and pay part of the wages of the third hand. *Smith v. Horlock* [1913] W. C. & Ins. Rep. (Eng.) 441, 109 L. T. N. S. 196, 6 B. W. C. C. 638.

<sup>9</sup> The act is applicable to a member of a crew of a small cargo boat, whose remuneration consisted of a specified share of the gross earnings. *Clark v. Jamieson* [1909] S. C. 132, 46 Scot. L. R. 74.

In *Jones v. The Alice & Eliza* (1910) 3 B. W. C. C. (Eng.) 495, it was held that the mere fact that the master was remunerated by the payment of two thirds of the gross receipts was not sufficient to enable the court to draw the inference that the master was not the servant of the owners, where the master's wife swore that he was the servant of the owners, and the latter declined to give any evidence upon the subject.

<sup>10</sup> There is no contract of service between the owner of a vessel and the master, where the owner agreed to furnish the vessel and



Members of the crew of a fishing vessel who are paid by a share of the profits or gross earnings of the vessel are expressly excluded from the act. See ante, 105.

## 2. Independent contractors.

It has been held that the word "workman" does not embrace employees who occupy the position of independent contractors.<sup>11</sup> But the mere fact that a man works by the piece is not sufficient

gear and repairs, and the master was to hire the crew and pay all other expenses, and go to what port he liked, and was to be paid by taking two thirds of the gross freight. *Boon v. Quance* (1910) 102 L. T. N. S. (Eng.) 443, 3 B. W. C. C. 106.

*Hughes v. Postlethwaite* (1910) 4 B. W. C. C. (Eng.) 105, was decided upon the authority of *Boon v. Quance*, to which it was similar in facts.

The master of a barge, who receives one half the net earnings as his wages, out of which he has to pay the mate, is not a workman. *Cole v. Shrubsall* [1912] W. C. Rep. (Eng.) 226, 5 B. W. C. C. 337.

The owners of a vessel are not estopped from denying that a mate was employed by them by the fact that compensation was given him for several months, which was paid through an insurance company with which the owners had insured both the captain and the mate, it being shown that the mate was engaged by the captain, and paid by him on the sharing system out of the profits of the voyage. *Standing v. Eastwood* [1912] W. C. Rep. (Eng.) 200, 106 L. T. N. S. 477, 5 B. W. C. C. 268.

There can be no compensation recovered for the death of a mate who was to receive a share of the freight of the voyage. *Hoare v. The Cecil Rhodes* (1911) 5 B. W. C. C. (Eng.) 49.

The decisions in these cases may also be referred to the principle that compensation is not recoverable where a "contract of service" does not exist between the workman and the alleged employer. See ante, 114.

<sup>11</sup> *Simmons v. Faulds* (1901) 17 Times L. R. (Eng.) 352, 65 J. P. 371; *Vamplew v. Parkgate Iron & Steel Co.* [1903] 1 K. B. (Eng.) 851, 72 L. J. K. B. N. S. 575, 67 J. P. 417, 51 Week. Rep. 691, 88 L. T. N. S. 756, 19 Times L. R. 421; *McGregor v. Dansken* (1899) 1 Sc. Sess. Cas. 5th series, 536, 36 Scot. L. R. 393, 6 Scot. L. T. 308.

<sup>12</sup> A workman whose trade was the fixing of enamel letters to windows, and who had been for a year in the habit of calling on a firm who made and dealt in enamel letters, and of obtaining work from them, being paid by the piece, defraying his own travelling expenses, and under no obligation to undertake any particular job, and who was at liberty to accept, and occasionally accepted, work from other employers, is a L.R.A.1916A.

to exclude him from the benefits of the compensation act.<sup>12</sup> Nor is a workman disentitled to compensation merely because he contracted to do the work at a lump sum, and not by the day.<sup>13</sup>

The question who are independent contractors has been passed upon in a number of cases involving the compensation act, which are cited below, but it should be noted that the act does not attempt to define the term "independent contractors," and these cases are governed by general principles.<sup>14</sup>

"workman." *Taylor v. Burnham* [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. C. C. 569.

A finding that the injured man was a workman is justifiable where he was one of a squad of mechanics who were paid by the piece, for work on a vessel under construction, but were bound to work continuously all the working hours recognized in the yard, were supervised by the foreman of the employer, and were subject to printed rules and regulations "to be observed by the workmen in the employment" of shipbuilders. *McCreedy v. Dunlop* (1900) 2 Sc. Sess. Cas. 5th series, 1027, 37 Scot. L. R. 779, 8 Scot. L. T. 91.

A finding that the injured person was a "workman" is justifiable, where he was employed in a quarry under an agreement that he should be paid so much for every ton he got out, and the tools were found for him, and he used to hire and discharge the men who worked under him. *Evans v. Penwyllt Dinas Silica Brick Co.* (1901) 18 Times L. R. (Eng.) 58.

A stone breaker engaged by a contractor to break stones for road metal at a certain rate per cubic yard of metal broken, and subject to the orders of the contractor, and to dismissal by him, is a "workman." *Doharty v. Boyd* [1909] S. C. 87, 46 Scot. L. R. 71.

A miner who is paid so much per ton of coal extracted, and extra for timbering, and who supplies his own tools and works in a room alone, as he can earn more by so doing than by sharing the room with another miner, is not an independent contractor. *Cargeme v. Alberta Coal & Min. Co.* (1912) 6 D. L. R. (Alberta) 231, 7 B. W. C. C. 1020, 22 West. L. Rep. (Can.) 68.

<sup>13</sup> *Ibid.*

<sup>14</sup> A man who enters into an agreement with a mining company to carry out certain specified operations is an independent contractor, and not a workman, where the mining company exercises no control over the man apart from the agreement. *Reid v. Leitch Collieries* (1912) 7 B. W. C. C. (Alberta) 1017.

An independent contract by which a slater undertook to do certain slating work for the employer is not changed into a contract of employment by the fact that after four days of work, the employer, being dissatisfied with the slow progress that was made, sent another slater with a laborer to

"push the work on." *Barnes v. Evans* (1914) W. C. & Ins. Rep. (Eng.) 113, 7 B. W. C. C. 24.

A laborer who, with several others, enters into a contract with a quarryman to remove the surface earth from a new part of the quarry, at so much per cubic yard, and who exercises full control over the work, and is not tied down to hours, is an independent contractor; and his wife is not entitled to compensation for injuries which he received, resulting in his death. *Hayden v. Dick* (1902) 5 Sc. Sess. Cas. 5th series, 150, 40 Scot. L. R. 95, 10 Scot. L. T. 380.

A man who agreed to undertake the trapping of rabbits on certain premises at so much a couple, the employer to supply the gear and also to allow the use of a cottage for the work, is not a workman, but an independent contractor. *McConnell v. Galbraith* (1913) 48 Ir. Law Times, 30 W. C. & Ins. Rep. 92, 7 B. W. C. C. 968.

A man who enters into a written contract with harbor commissioners "for supplying a yawl and crew of four men" for use at a certain pilot station and lighthouse is an independent contractor, and not a workman. *Walsh v. Waterford Harbour Comrs.* (1914) W. C. & Ins. Rep. 16, 47 Ir. L. Times 263, 7 B. W. C. C. 960.

Where a contractor had a contract from a district council to erect certain laborers' cottages, and made an agreement with a mason for the latter to do the work, the contractor furnishing the materials, and the mason agreed to carry out the contract to the satisfaction of the council's engineer, and to have the work finished in the time specified in the contract between the council and the contractor, and there was no stipulation that he was to work continuously, the county court judge may find that the mason was a subcontractor, and that the relation between him and the contractor was not that of master and servant, but that of contractor and subcontractor; the fact that he was to be paid by the day not deciding the case. *Byrne v. Baltinaglass Rural Dist. Council* (1911) 45 Ir. L. Times, 206, 5 B. W. C. C. 566.

A man engaged by a farm bailiff to cut down certain trees may be found to be an independent contractor, and not a workman, where there were four men engaged to do the work, and the work was paid for at so much a tree and so much for extras, and the men cut the tree as and when they liked, were not bound to work every day unless they saw fit, and the bailiff made little or no interference with the work provided it was done within a reasonable time, notwithstanding the bailiff had, on a former occasion, sent a man away for drunkenness, and on this occasion once told a man which way to make a tree fall, and, immediately after the injury to the workman, increased the number of workmen from three to four. *Curtis v. Plumtre* (1913) W. C. & Ins. Rep. (Eng.) 195, 6 B. W. C. C. 87.

The owner of a horse, who contracts, L.R.A.1916A.

when required, to drag logs from one place to another, for which he is paid at a certain rate per day, and whose share of the work is confined to leading the horse, which he might do by means of a substitute, there being no contract that he should perform the work personally, is not a "workman." *Chisholm v. Walker* [1909] S. C. 31, 46 Scot. L. R. 24, 2 B. W. C. C. 261. *Paterson v. Lockhart* (Scot.) *infra*, in which the man was bound to do the work himself, was distinguished.

A cartman who carted stones for a county council, doing the work when he wished, and subject to no control by the council except that their surveyor told him where the stones were to be placed, and who was paid by the day for the work he did, may be found not to be a workman within the act. *Ryan v. Tipperary* (1912) 46 Ir. Law Times, 69, 5 B. W. C. C. 578.

But the finding that the applicant for compensation was a workman is supported by evidence that he was employed by a road overseer to cart stone, that he furnished his own cart and horse, and was paid so much per day, and that he might do work for other people on any particular day "provided that he was not badly wanted." *O'Donnell v. Clare County Council* (1913) W. C. & Ins. Rep. 273, 47 Ir. Law Times 41, 6 B. W. C. C. 457.

A plumber called in to make repairs, and who was paid for the time he worked, the owner of the house supplying the material, indicating where the defect was, and from time to time, during the course of the work, visiting the place to see what progress had been made, is a servant, and not an independent contractor. *McNally v. Fitzgerald* (1914) 48 Ir. Law Times 4, 7 B. W. C. C. 966.

Where a paper hanger and decorator agreed to paper a house being erected by a builder, and was permitted to come and go and work exactly when he liked, and made out a bill on the printed form of the work done by him, and receipted it on payment, and there was evidence at the hearing of a claim for compensation that the builder had told "all his other men," except the paper hanger, not to use the plank by the breaking of which he was injured, the county court judge may find that the paper hanger was a workman within the meaning of the act. *Lewis v. Stanbridge* (1913) W. C. & Ins. Rep. (Eng.) 515, 6 B. W. C. C. 568.

The relation of master and servant exists where a man who provided his own horse and cart entered into a contract with a dairy society to cart his milk to and from the creamery during a certain period on such dates as it should fix, for which service he was to be paid at the rate of one-half penny per gallon. *Clark v. Baillie-Borough Co-op. Agri. & D. Soc.* (1913) W. C. & Ins. Rep. (Eng.) 374, as cited in Law Reports Current Dig. 1913, col. 772.

A man engaged to take charge and manage a herd of cows at a dairy, who, under the contract of employment, is to feed



### 3. "Casual" employees.

For American cases defining this term, see post, 247.

A charwoman who has been employed regularly every Friday and every other Tuesday for over eighteen months is in the regular, and not the casual, employment of the defendants.<sup>15</sup> In a few cases it has been held that a window washer who worked only occasionally as such work was necessary was engaged in casual employment only.<sup>16</sup> The work of cutting down or lopping trees, which is done by a workman incidentally, in connection with other work, is casual.<sup>17</sup> But a workman employed each season for several weeks or even months at a time to do work in the employer's woods, in cutting underwood, trimming trees, etc., and who was paid by the week, not losing any time because of rain, is not a casual laborer.<sup>18</sup>

The owner of a small garden which is

the herd "according to instructions from the employers," to manufacture "the milk into goods, as may be desired by the employers," and to do various other things, "as may be required by the employers," is a workman within the meaning of the act. *Roper v. Freke* (1915) 31 Times L. R. (Eng.) 507.

A man engaged to quarry, from a quarry on an estate, stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct, who was paid by the day, and who might employ assistants, to be paid through him at the same rate, and whose tools were supplied partly by himself and partly by the estate, and who was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made,—was a servant or workman in the sense of the act. *Pater-son v. Lockhart* (1906) 7 Sc. Sess. Cas. 5th series, 954, 42 Scot. L. R. 24. See *Chisholm v. Walker* (Scot.) supra.

<sup>15</sup> *Dewhurst v. Mather* [1908] 2 K. B. (Eng.) 754, 77 L. J. K. B. N. S. 1077, 99 L. T. N. S. 568, 24 Times L. R. 819, 52 Sol. Jo. 681.

<sup>16</sup> A man who was sent for to wash windows whenever they needed it, which was at intervals of about six weeks, there being no agreement between the parties, was in the casual employment only, although he had been doing the work for about two years. *Hill v. Begg* [1908] 2 K. B. (Eng.) 802, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 24 Times L. R. 711, 52 Sol. Jo. 581.

Where a window cleaner about once a month went to clean the windows of the house of a medical practitioner, who used a portion of the house in connection with his professional practice, there being no formal contract between the parties, and the window cleaner calling and doing the

work without receiving on each occasion a special invitation or special permission to do so, his employment was of a casual nature. *Rennie v. Reid* [1908] S. C. (Scot.) 1057.

Under § 13, if the employment is not of a casual nature, it is not necessary to consider the further question with regard to whether or not the workman was employed otherwise than for the purposes of the employer's trade or business.<sup>20</sup>

As to what constitutes employment "for the purposes of the employer's trade or business," see ante, 96.

### 4. Seamen.

As maritime work was not one of the descriptions of employment covered by the act of 1897, it did not affect the relation between shipowners and sailors "when engaged in their ordinary occupa-

work without receiving on each occasion a special invitation or special permission to do so, his employment was of a casual nature. *Rennie v. Reid* [1908] S. C. (Scot.) 1057.

The county court judge is justified in finding that the employment is of a casual nature where the workman, a window cleaner, cleaned the windows of a private house for the same employer once a month for about four years, when he fell and died as a result, and no definite arrangements had been made in advance as to the regular time for the work. *Ritchings v. Bryant* (1913) W. C. & Ins. Rep. (Eng.) 171, 6 B. W. C. C. 183.

<sup>17</sup> Where a carpenter undertakes a job of cutting down trees on the property of a person for whom he has been working as a carpenter, his employment is casual. *McCarthy v. Noreott* (1908) 43 Ir. Law Times, 17.

The county court judge may find that a jobbing gardener who was employed to cut down and lop some trees in the grounds of a large private house, and who, after that work was done, assisted in relaying part of the lawn, and after the lawn was finished was put on to cut and lop some more trees, and was paid at so much per day, there being nothing said as to how long he was to be employed, was engaged in employment of a casual nature, and was not within the protection of the statute. *Knight v. Bucknill* (1913) W. C. & Ins. Rep. (Eng.) 175, 57 Sol. Jo. 245, 6 B. W. C. C. 160.

<sup>18</sup> *Smith v. Buxton* (1915) 84 L. J. K. B. N. S. (Eng.) 697, 112 L. T. N. S. 893, W. C. & Ins. Rep. 126, 8 B. W. C. C. 196.

<sup>19</sup> *Tombs v. Bomford* (1912) W. C. Rep. (Eng.) 229, 106 L. T. N. S. 823, 5 B. W. C. C. 338.

<sup>20</sup> *Smith v. Buxton* (Eng.) supra.

tion of sailing upon the seas.”<sup>21</sup> This doctrine does not involve the consequence that the mere fact of the accidents having happened in or upon a ship prevents the injured workman from claiming compensation under the act. His right of recovery must be tested with reference to the circumstances attending the accident.<sup>22</sup> Under the act of 1897, the seaman on a dock or harbor in a foreign country was in the same position in reference to compensation as if he was at sea.<sup>23</sup> But the act of 1906 is expressly declared (§ 7) to be applicable to “masters, seamen, and apprentices in the

sea service, and apprentices in the sea-fishing service.”

##### 5. Remuneration.

The word “remuneration,” as used in the act (§ 13 and sched. 1, 2 (a)), means the same as “earnings.”<sup>24</sup>

##### e. Who are “dependents.”

For American decisions defining this term, see post, 248.

##### 1. In England and Ireland and in Scotland under the Act of 1906.

The word “dependent” probably means, dependent for the ordinary necessities of life for a person of that class and position.”<sup>25</sup> The term does not sig-

<sup>21</sup> Lord Halsbury in *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

A seaman engaged in casting off his ship from a quay is doing an ordinary seaman's work, and is not within the act of 1897. *Williams v. Mack* (1903; C. C.) 116 L. T. Jo. (Eng.) 179, 6 W. C. C. 113.

The act of 1897 does not apply to a seaman injured while doing a seaman's work. *Griffiths v. Warren* (1904; C. C.) 116 L. T. Jo. (Eng.) 575, 6 W. C. C. 65.

In an Irish case it was held that an able-bodied seaman, working at the hoisting of a ship's boat by means of a crane on the quay alongside his ship, is merely carrying out the normal duties of a seaman, and is therefore not engaged in an employment to which the act applies. *O'Hanlon v. Dundalk & N. Steam Packet Co.* (1899) 33 Ir. Law Times, 36.

<sup>22</sup> An ordinary laborer employed for the purpose of doing anything that is to be done on a ship lying in a dock is not without the scope of the act. *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

Nor is a man working on a dredger, which went 2 miles out to sea for the purpose of being emptied. *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. (Eng.) 132, 68 L. J. Q. B. N. S. 740, 47 Week. Rep. 533, 80 L. T. N. S. 586, 15 Times L. R. 341.

<sup>23</sup> *Griffiths v. Warren* (Eng.) supra.

<sup>24</sup> In estimating the remuneration of the purser on a ship under § 13 of the act, both a bonus which he received and the profit which he made by selling whisky, are to be taken into consideration. *Skailles v. Blue Anchor Line* [1911] 1 K. B. (Eng.) 360, 80 L. J. K. B. N. S. 442, 103 L. T. N. S. 741, 27 Times L. R. 119, 55 Sol. Jo. 107, 4 B. W. C. C. 16.

A ship captain is properly held to be a workman receiving less than £250 a year where he was employed under a contract by which he was to receive his board and accommodation, estimated at £45 and 10s. per annum, and £20 per month, with a bonus of £48 if the ship kept free from all damage and claim, but otherwise was L.R.A.1916A.

to forfeit the bonus and receive but £16 per month, and was lost at sea with his ship, since, had he survived, he, under the terms of the contract, would have received only the £16 per month, plus the board and accommodation. *Williams v. The Maritime* [1915] 2 K. B. (Eng.) 137, 84 L. J. K. B. N. S. 633, [1915] W. C. & Ins. Rep. 97, 8 B. W. C. C. 267, [1915] W. N. 71, 31 Times L. R. 218. Lord Cozens-Hardy, M. R., said: “It was contended on behalf of the employers, that regard ought to be had to the circumstance that, under the prior agreement, the terms of which were less beneficial to the captain, his average remuneration had exceeded £250, and further, that regard ought to be had to the fact that the shipowners did not always enforce against an old servant their rights to a reduction of salary, unless satisfied that there was real fault on the captain's part. It seems to me that such generosity on the part of the owners cannot be taken into account. The question is, what was the salary to which he was entitled? To answer this question, the language of the agreement itself is sufficient.”

<sup>25</sup> See *Simmons v. White Bros.* [1899] 1 Q. B. (Eng.) 1007, 68 L. J. Q. B. N. S. 507, 47 Week. Rep. 513, 80 L. T. N. S. 344, 15 Times L. R. 263, and *Lord Shand in Main Colliery Co. v. Davies* [1900] A. C. (Eng.) 358, 69 L. J. Q. B. N. S. 755, 83 L. T. N. S. 83, 16 Times L. R. 460, 65 J. P. 20. In the latter case Lord Halsbury and Davey expressed the opinion that the question of dependency was to be decided without respect to the standard of living in the neighborhood or the class to which the family belong; that the act sets up no such standard; and that the actual means of living and expenditure need alone be regarded. Lord Shand did not agree with this view.

The latter case was followed by *French v. Underwood* (1903) 19 Times L. R. (Eng.) 416.

In *Howells v. Vivian* (1901) 85 L. T. N. S. (Eng.) 529, 4 W. C. C. 106, Collins, M. R., said: “It seems to me to be difficult to approach the question of dependency, as a matter of law, without taking some standard of living as a guide. There



nify a person who merely derived a benefit from the earnings of the injured workman.<sup>26</sup> Similarly it is held there may be a "dependency" for the purposes of the act, although the claimant is able to maintain himself and family without the assistance of the deceased.<sup>27</sup>

Dependency under the statute is wholly a question of fact.<sup>28</sup> There is no presumption of dependency in the case of a wife,<sup>29</sup> nor in the case of minor children.<sup>30</sup> So, whether or not parents are

partially dependent upon a son's wages is a question of fact, and the finding of the county judge will not be disturbed if there is any evidence to support it.<sup>31</sup>

Dependency within the meaning of the act is not to be tested solely by the legal liability to render support.<sup>32</sup> So, the mere fact that a husband is under obligations to support his wife does not necessarily make the wife a dependent.<sup>33</sup> And a widow who lived with and was entirely supported by an unmar-

must be some standard with regard to the class of persons with whom the act deals, and their comfortable maintenance."

<sup>26</sup> *Simmons v. White* (1899) 80 L. T. (Eng.) N. S. 344, [1899] 1 Q. B. 1007, 63 L. J. Q. B. N. S. 507, 47 Week. Rep. 513, 15 Times L. R. 263.

<sup>27</sup> *Howells v. Vivian* (1901) 18 Times L. R. (Eng.) 36, 50 Week. Rep. 163, 85 L. T. N. S. 529, 4 W. C. C. 106. Matthew, L. J., said: "The county court judge seems to have laid down a rule of law which excluded from consideration the question whether the wages of the deceased were part of the income or means of living of the family because the whole family could be maintained without those wages. It never was intended that the county court judge should in every case inquire critically into the standard of living, and say whether, with the earnings of the deceased workman, the family was above or below that standard. I agree that it is not decisive of the question of dependency that the deceased workman did contribute to the family fund, or, on the other hand, that the father could support the family without that contribution."

<sup>28</sup> *Lee v. The Bessie* [1912] 1 K. B. (Eng.) 83, [1911] W. N. 222, 105 L. T. N. S. 659, 5 B. W. C. C. 55, 81 L. J. K. B. N. S. 114, 12 Asp. Mar. L. Cas. 89, Ann. Cas. 1913E, 477.

The widow of a deceased workman may be found to be partially dependent upon the deceased's earnings, where it appeared that, at the time of the accident, she was disabled and unable to earn anything, although she had formerly earned wages, and the wages of the deceased were not sufficient to support them both. *Smith v. Cope* [1913] W. C. & Ins. Rep. (Eng.) 460, 6 B. W. C. C. 569.

A daughter who kept house for her father, who was the tenant and owned the furniture, may be wholly dependent upon his earnings although she had a lodger, the profit from whom amounted to 4 or 5 shillings per week. *Marsh v. Boden* (1905) 7 W. C. C. (Eng.) 110. The court held that the profit from the lodger was part of the father's earnings, since he owned the furniture and was the tenant.

<sup>29</sup> *New Monckton Collieries v. Keeling* [1911] A. C. (Eng.) 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332, overruling *Williams v. Ocean Coal Co.* L.R.A.1916A.

[1907] 2 K. B. (Eng.) 422, 76 L. J. K. B. N. S. 1073, 97 L. T. N. S. 150, 23 Times L. R. 584.

The House of Lords' decision must also be considered as overruling a decision of the Irish court of appeal to the effect that the presumption that the wife is wholly dependent upon her husband is not rebutted by proof that, at the time of his death, he was confined in an asylum as a dangerous lunatic, and was maintained by the asylum authorities. *Kelly v. Hopkins* [1908] 2 I. R. (Ir.) 84.

Dependency is a question of fact, and there is no question of any presumption of law that a widow is dependent upon earnings of her husband at the time of his death. *Polled v. Great Northern R. Co.* (1912) 5 B. W. C. C. (Eng.) 620.

<sup>30</sup> *Lee v. The Bessie* [1912] 1 K. B. (Eng.) 83, 81 L. J. K. B. N. S. 114, 105 L. T. N. S. 659, [1911] W. N. 222, 12 Asp. Mar. L. Cas. 89, [1912] W. C. Rep. 58, 5 B. W. C. C. 55, Ann. Cas. 1913E, 477, approving *Briggs v. Mitchell* [1911] S. C. 705, 48 Scot. L. R. 606, 4 B. W. C. C. 400.

<sup>31</sup> *Turner v. Miller* (1910) 3 B. W. C. C. (Eng.) 305; *Robertson v. Hall Bros. S. S. Co.* (1910) 3 B. W. C. C. (Eng.) 368.

The county court judge may treat a mother as partially rather than wholly dependent upon the earnings of her son, although her sole support was such earnings, together with the sum of 6 shillings a week earned by each of her two daughters. *Ford v. Oakdale Colliery Co.* (1915) 8 B. W. C. C. (Eng.) 127.

<sup>32</sup> Dependency is a question of actual fact, and that actual fact is not settled by a consideration of the legal proposition of obligation of either the husband to the wife, or the parent to the child. *Dobbies v. Egypt & L. S. S. Co.* [1913] S. C. 364, 50 Scot. L. R. 222, [1913] W. C. & Ins. Rep. 75, 6 B. W. C. C. 348.

See also *Lee v. The Bessie* [1912] 1 K. B. (Eng.) 83, 81 L. J. K. B. N. S. 114, 105 L. T. N. S. 659, 5 B. W. C. C. 55, [1911] W. N. 222, 12 Asp. Mar. L. Cas. 89, [1912] W. C. Rep. 58, Ann. Cas. 1913E, 477.

<sup>33</sup> Where a wife has not, for twenty years previous to a man's death, lived with him or been supported in any way by him, she is not a dependent upon him. *New Monckton Collieries v. Keeling* [1911] A. C. (Eng.) 648, 80 L. J. K. B. N. S.

ried son was wholly dependent upon him, notwithstanding her right to relief from four other sons, who were married, and who did not contribute to her support.<sup>34</sup>

A woman may be dependent upon her sons as well as upon her husband where the earnings of all went into a common fund out of which the family was supported. The application of this principle works to the advantage of the dependents, in a case where both the father and a contributing son were killed in the same accident,<sup>35</sup> and where the son or other contributing member of the family only was killed by accident.<sup>36</sup> But it may work to the disadvantage of the dependent where the father only was killed, since, according to this view, the mother

and dependent children are not to be considered wholly, but only partially, dependent upon him.<sup>37</sup> A father earning wages may be "in part dependent" upon the earnings of his child, within the meaning of the act; and there is evidence upon which the father may be found to be, in fact, so dependent, and to be entitled to compensation for the death of the child, where it is proved that the child contributed to the family fund, and that the father received the contribution and spent it in maintaining himself and his family.<sup>38</sup>

The mere fact that a man has deserted his family does not preclude them from recovering compensation for his death,<sup>39</sup> and the fact that a workman had, when

1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332.

<sup>34</sup> Rintoul v. Dalmeny Oil Co. [1908] S. C. (Scot.) 1025.

<sup>35</sup> Where a father and two sons, all killed in one accident, paid their wages in a common fund for the support of the family, the mother and the surviving children are entitled to receive compensation in respect to the death of each of the deceased. *Hodgson v. West Stanley Colliery* [1910] A. C. (Eng.) 229, 79 L. J. K. B. N. S. 356, 102 L. T. N. S. 194, 26 Times L. R. 333, 54 Sol. Jo. 403, 3 B. W. C. C. 260, 392, 47 Scot. L. R. 881.

<sup>36</sup> *McLean v. Moss Bay Hematite Iron & Steel Co. (H. L.)* [1910] W. N. (Eng.) 102, 54 Sol. Jo. 441, 3 B. W. C. C. 402, where a mother sought and was allowed compensation for the death of a son who put his wages into the common household fund, although the mother lived with her husband and was also dependent upon his wages.

*Toole v. The Isle of Erin* (1909) 3 B. W. C. C. (Eng.) 110, where the court took the position that the wife cannot be wholly dependent upon her husband and partially dependent upon a brother, for whose death compensation was sought, is overruled in effect by *Hodgson v. West Stanley Colliery Co.*

<sup>37</sup> The effect of the decisions cited in the two preceding notes is to overrule *Senior v. Fountains* [1907] 2 K. B. (Eng.) 563, 76 L. J. K. B. N. S. 928, 97 L. T. N. S. 562, 23 Times L. R. 634, where it was held that a widow and children of a workman were none the less "wholly dependent upon his earnings at the time of his death" because he had been enabled through the receipt by him, either directly or through his wife as his agent, of moneys from wage earning sons, or of moneys coming to him through other channels, to augment the fund out of which he was legally bound to maintain, and had maintained, his household.

<sup>38</sup> *Main Colliery Co. v. Davies* [1900] A. C. (Eng.) 358, 69 L. J. Q. B. N. S. 755, 83 L. T. N. S. 83, 16 Times L. R. L.R.A.1916A.

460, 65 J. P. 20. This decision embodies a doctrine similar to that adopted in an earlier case, in which it was held that a finding of "dependency" was sufficiently supported by evidence that the parents of an employee fourteen years old, who was killed, had received his weekly wages for five weeks before his death, and handed over to him such pocket money as they thought right. *Simmons v. White Bros.* [1899] 1 Q. B. (Eng.) 1005, 68 L. J. Q. B. N. S. 507, 47 Week. Rep. 513, 80 L. T. N. S. 344, 15 Times L. R. 263.

<sup>39</sup> Minor children may be found to be wholly dependent upon the earnings of their father where he had deserted his wife and family, and for two years had made but small payments, amounting in all to £2, for their support, and thereafter, the payments having ceased, the wife obtained a decree against him for alimony, and recovered about 7 shillings from his employers by arrestment used on the decree, and the workman then disappeared and was not subsequently traced until his death. *Young v. Niddrie & B. Coal Co.* [1913] A. C. (Eng.) 531, 82 L. J. P. C. N. S. 147, 109 L. T. N. S. 568, 29 Times L. R. 626, 57 Sol. Jo. 685, [1913] W. N. 206, [1913] W. C. & Ins. Rep. 547, 6 B. W. C. C. 774, [1913] S. C. 66, 50 Scot. L. R. 744, reversing [1912] S. C. 644, 49 Scot. L. R. 518, 5 B. W. C. C. 552.

It is not a correct proposition in law that when it is found that, as a matter of fact, a father has deserted his children for three years, and paid nothing toward their support during that period, that necessarily ends the matter, and his employer is not liable to pay compensation to his children. *Dobbies v. Egypt & L. S. S. Co.* [1913] S. C. 364, 50 Scot. L. R. 222, [1913] W. C. & Ins. Rep. 75, 6 B. W. C. C. 348.

Although a workman had turned his wife out of doors, and she had lived separate from him for eleven years, receiving no support from him, she may be found to be wholly dependent upon him. *Medler v. Medler* (1908; C. C.) 124 L. T. Jo. (Eng.) 410, 1 B. W. C. C. 332.



out of work, left his wife, and remained away until his death, some time afterwards, does not prevent her from being "dependent" upon him.<sup>40</sup> But a deserted wife may, by her conduct, estop herself from claiming to be a dependent.<sup>41</sup>

A posthumous child may be a "dependent" within the act.<sup>42</sup> So, a child en ventre sa mere may be a dependent upon the earnings of its father, although indirectly through its mother.<sup>43</sup> Illegitimate children may be dependents within the sense of the act; and this is so even if they are posthumous.<sup>44</sup> Evidence of statements by a deceased workman that he was the father of an illegitimate child,

born after his death, and that he would marry the mother before the child was born, is admissible to show both paternity and dependency of the child.<sup>45</sup> Such children, however, may be shown as a matter of fact not to be dependents.<sup>46</sup> An illegitimate child of a workman cannot recover compensation for his death in excess of what he would have been obliged to give under a decree of affiliation and aliment, in the absence of any proof that the deceased had ever contributed to the child's support in excess of what he was required to by the decree.<sup>47</sup> A woman is not entitled to compensation for the death of a man with whom she had cohabited for a period of

<sup>40</sup> *Coulthard v. Consett Iron Co.* [1905] 2 K. B. (Eng.) 869, 22 Times L. R. 25, 75 L. J. K. B. N. S. 60, 54 Week. Rep. 139, 93 L. T. N. S. 756.

The fact that a workman who, being out of work in Scotland, went to Ireland, and obtained employment there, had not contributed anything to the support of his wife for several months while he was out of work, during which time she was supported by her father, does not prevent her and a posthumous child from being dependents, where, prior to the time he was out of work, he had supported her, and he had been at work but little over a week when he was killed. *Reg. v. Clarke* [1906] 2 I. R. (Ir.) 135.

<sup>41</sup> As where the wife left her husband more than twenty years before his death, and had supported herself out of her earnings. *New Monckton Collieries v. Keeling* [1911] A. C. (Eng.) 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332.

Where a woman deliberately, of her own choice, separated from her husband, and a daughter deliberately, of her own choice, went with the mother, and the mother had property of her own, and the husband never contributed toward the maintenance of either of them, they are not dependent upon him within the meaning of the act. *Polled v. Great Northern R. Co.* (1912) 5 B. W. C. C. (Eng.) 620, former appeal, 5 B. W. C. C. 115.

Where a wife had been deserted for a number of years, and subsequently lived with another man, neither she nor their children can be considered dependents. *Lee v. The Bessie* [1912] 1 K. B. (Eng.) 83 [1911] W. N. 222, 105 L. T. N. S. 659, 81 L. J. K. B. N. S. 114, 5 B. W. C. C. 55, 12 Asp. Mar. L. Cas. 89, [1912] W. C. Rep. 58, Ann. Cas. 1913E, 477.

<sup>42</sup> *Williams v. Ocean Coal Co.* [1907] 2 K. B. (Eng.) 422, 76 L. J. K. B. N. S. 1073, 97 L. T. N. S. 150, 23 Times L. R. 584.

<sup>43</sup> *Day v. Markham* (1904; C. C.) 39 L. J. (Eng.) 164, 6 W. C. C. 115.

<sup>44</sup> A child en ventre sa mere is a "dependent." *L.R.A.* 1916A.

pendent" of the man who admits that he is the father, and who had promised to marry the mother. *Orrell Colliery Co. v. Schofield* [1909] A. C. (Eng.) 433, 78 L. J. K. B. N. S. 677, 100 L. T. N. S. 786, 25 Times L. R. 569, 53 Sol. Jo. 518, affirming [1908] W. N. 243, 25 Times L. R. 106, 53 Sol. Jo. 117.

In *Bowhill Coal Co. v. Neish* [1909] S. C. 252, 46 Scot. L. R. 250, where the mother of an illegitimate child had obtained a decree for aliment against the father, but nothing had been actually paid thereon, the court rejected the contention of the defendant that, inasmuch as no actual money of the deceased was proved to have been actually spent upon the child, the child could not be said to be dependent on him.

<sup>45</sup> *Lloyd v. Powell Duffryn Steam Coal Co.* (H. L.) [1914] A. C. (Eng.) 733, 111 L. T. N. S. 388, 83 L. J. K. B. N. S. 1054, 30 Times L. R. 456, 58 Sol. Jo. 514, 7 B. W. C. C. 330, reversing [1913] 2 K. B. 130, 82 L. J. K. B. N. S. 533, 108 L. T. N. S. 201, 29 Times L. R. 291, 57 Sol. Jo. 301, [1913] W. N. 51, [1913] W. C. & Ins. Rep. 355, 6 B. W. C. C. 142.

<sup>46</sup> An illegitimate child who at its birth had been taken over by another woman and supported by her and her husband, except for a small sum of money and a little clothing, is not a dependent upon her mother. *Briggs v. Mitchell* [1911] S. C. 705, 48 Scot. L. R. 606, 4 B. W. C. C. 400.

And the husband of the mother of an illegitimate son, who is not the latter's putative father, is not a "dependent," although the son's earnings were put into a common fund for the support of the family. *McLean v. Moss Bay Iron & Steel Co.* [1909] 2 K. B. (Eng.) 521, 78 L. J. K. B. N. S. 849, 100 L. T. N. S. 871, 25 Times L. R. 633. This decision was reversed by the House of Lords, but on another point. See note, 36 supra. See the decision of the House of Lords on another phase of this case, note 36, supra. There was no appeal by the husband.

<sup>47</sup> *Gourlay v. Murray* [1908] S. C. 769, 45 Scot. L. R. 577, 1 B. W. C. C. 335.

ten and one-half months, they holding themselves out as man and wife, where the evidence shows that there was some talk of having the marriage ceremony performed, but the man wished to have it postponed until he was in better circumstances, and upon the birth of a posthumous child the mother had it registered as illegitimate.<sup>48</sup>

A person confined in a prison is not a dependent upon her son.<sup>49</sup> So, an inmate of a workhouse to whose support the injured workman does not in fact contribute anything is not a "dependent" within the meaning of the act, although a liability under the poor law to contribute to his support could be enforced against the workman.<sup>50</sup> To the extent to which a mother was supported by the guardians of the poor, she is not dependent upon her son.<sup>51</sup>

It is not necessary that the support be furnished regularly by the workman to render the recipient a dependent.<sup>52</sup>

In the case of the death of a workman, leaving dependents, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of the act, is whether money which the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time. Accordingly the fact that money came to them on the death of the workman cannot be taken into consideration.<sup>53</sup>

Upon the question whether alien dependents residing abroad are within the purview of the English act, see the decision of the House of Lords construing the British Columbia act, cited in note 64, *infra*.

## 2. In Scotland under the act of 1897.

Under the act of 1897, dependents in Scotland included "such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death." As the provisions in the earlier act relative to Scotland differ from those applying in England and Ireland, the Scotch decisions under that act are discussed separately.

The mother of a deceased workman, whose parents were in part dependent on him, is not entitled to sue, where the father is alive.<sup>54</sup> Grandchildren are entitled to claim compensation for the death of their grandfather, in cases where their father is dead.<sup>55</sup> An illegitimate child has no right to sue the employer of his deceased mother.<sup>56</sup> A woman living separate from a husband who only contributed a small sum to her support, the rest of her sustenance being obtained from relatives, and occasional employment, may claim compensation for his death.<sup>57</sup> But if, as a matter of

<sup>48</sup> *Fife Coal Co. v. Wallace* [1909] S. C. 682, 46 *Scot. L. R.* 727, 2 *B. W. C. C.* 264.

<sup>49</sup> A widow who at the date of her son's death was undergoing a sentence of confinement in a state reformatory for inebriates, and during the four years preceding had been in prison with the exception of ten months, and during that period had occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son, who had contributed 5s. or 6s. a week towards her support, was not wholly or partially dependent on her son's earnings at the time of his death, within the meaning of the act. *Addie & Sons' Collieries v. Trainer* (1904) 7 *Sc. Sess. Cas.* 5th series (*Scot.*) 115.

<sup>50</sup> *Rees v. Penrikyber Nav. Colliery Co.* [1903] 1 *K. B.* (*Eng.*) 259, 72 *L. J. K. B.* N. S. 85, 67 *J. P.* 231, 51 *Week. Rep.* 247, 87 *L. T. N. S.* 661, 19 *Times L. R.* 113, 1 *L. G. R.* 173.

The wife of a workman who had deserted her, and who did not furnish support for her for seven years, who was obliged to go to the workhouse, is not a dependent. *Devlin v. Pelaw Main Collieries* (1912) 5 *B. W. C. C.* (*Eng.*) 349.

<sup>51</sup> *Byles v. Pool* (1908; *C. C.*) 126 *L. T. L.R.A.* 1916A.

*Jo. (Eng.)* 287, 73 *J. P.* 104, 53 *Sol. Jo.* 215, 2 *B. W. C. C.* 484.

<sup>52</sup> Where parents received money from time to time from their deceased son during his lifetime, they may be found to be dependent, although there was no evidence that the money was sent at regular intervals or in fixed amounts. *Follis v. Schaaek Mach. Works* (1908) 13 *B. C.* 471, 1 *B. W. C. C.* 442.

<sup>53</sup> *Pryce v. Penrikyber Nav. Colliery Co.* [1902] 1 *K. B.* (*Eng.*) 221, 85 *L. T. N. S.* 477, 18 *Times L. R.* 54, 71 *L. J. K. B.* N. S. 192, 66 *J. P.* 198, 50 *Week. Rep.* 197.

<sup>54</sup> *Barrett v. North British R. Co.* (1899) 1 *Sc. Sess. Cas.* 5th series, 1139, 36 *Scot. L. R.* 874, 7 *Scot. L. T.* 88.

<sup>55</sup> *Hanlin v. Melrose* (1899) 1 *Sc. Sess. Cas.* 5th series, 1012, 36 *Scot. L. R.* 814, 7 *Scot. L. T.* 67; *Cooper v. Fife Coal Co.* [1906-07] *S. C.* (*Scot.*) 564 (grandchild's mother was dead, and whereabouts of father unknown).

<sup>56</sup> *Clement v. Bell* (1899) 1 *Sc. Sess. Cas.* 5th series, 924, 36 *Scot. L. R.* 725, 7 *Scot. L. T.* 44.

<sup>57</sup> *Cunningham v. McGregor* (1901) 3 *Sc. Sess. Cas.* 5th series, 775, 38 *Scot. L. R.* 574, 9 *Scot. L. T.* 36.

*Cunningham v. McGregor* was followed in



fact, the wife receives nothing at all from her husband who has left her, then she is not dependent upon him.<sup>58</sup> A woman deserted by her husband, having no title to sue for damages or solatium for the death of her son, has no title to claim compensation under the act as a dependent upon him.<sup>59</sup>

The fact that the father of the decedent was assisting a crippled relative does not show, as a matter of law, that he was not "partially dependent" on his son's earnings.<sup>60</sup> A parent who has a wage sufficient for his support is not a dependent merely because some member

of his family had been in the way of giving him presents of money.<sup>61</sup> A daughter who keeps house for her father may be dependent upon him.<sup>62</sup>

### 3. In the Colonies.

The court of appeal of British Columbia has held that alien dependents residing abroad are not within the purview of the provincial act.<sup>63</sup> But the House of Lords, to which an appeal was taken, upheld the right of alien dependents to recover, as they were not within the exceptions contained in the act.<sup>64</sup>

In order to recover under the British

*Sneddon v. Addie & Sons' Collieries* (1904) 6 Sc. Sess. Cas. 5th series, 992, 41 Scot. L. R. 826, 12 Scot. L. T. 229, where it was held that a woman unable to do anything for her own support is entitled to compensation for the death of her husband, although he had deserted her.

The wife of a foreigner who came to Scotland, and during eight months' residence forwarded her the sum of £1, may be found to be a "dependent," but not wholly dependent upon her husband, where she supported herself in part by earnings as an outdoor laborer at a small wage. *Baird v. Birsztan* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 438.

<sup>58</sup> Where a wife voluntarily left her husband, and a month afterwards gave birth to a child, and subsequently, by means of her earnings as a weaver, and the assistance of the relatives with whom she lived, she supported herself and her child, never asking for and never receiving aliment from her husband, it cannot be said that either the wife or the child were either wholly or in part dependent upon the earnings of the workman at the time of his death, twelve years after the separation. *Lindsay v. M'Glashen* [1908] S. C. 762, 45 Scot. L. R. 559; *Turners v. Whitefield* (1904) 6 Sc. Sess. Cas. 5th series, 822, 41 Scot. L. R. 631, 12 Scot. L. T. 131, followed.

A woman who has been for fourteen years living apart from her husband, and was supported by an illegitimate son, is not wholly or in part dependent on the earnings of her husband, and is not entitled to compensation. *Turners v. Whitefield* (Scot.) *supra*.

<sup>59</sup> *Campbell v. Barclay, Curle & Coy* (1904) 6 Sc. Sess. Cas. 5th series, 371, 41 Scot. L. R. 289, 11 Scot. L. T. 682.

<sup>60</sup> *Legget v. Burke* (1902) 4 Sc. Sess. Cas. 5th series, 693, 39 Scot. L. R. 448, 9 Scot. L. T. 518.

<sup>61</sup> *Arrol v. Kelly* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 906 (son had made payments to his father which averaged 10 s. weekly; father's average weekly income was £1, 4s. 11d.).

<sup>62</sup> The daughter of a workman, who had been previously earning wages, but who after her mother's death remained at home to keep her father's house, getting from L.R.A.1916A.

him board, lodging, and clothing, but no wages, is a dependent in the sense of the act. *Moynes v. Dixon* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 386. Lord M'Laren said: "If it had been meant that the right was to be limited to those who were in the position to sue an action for aliment, it would have been very easy to say so, or if it had been meant to exclude those who were earning wages for themselves, that again could have been very shortly and definitely expressed in the statute. . . . But the analogy of an alimentary claim is not suggested by anything in the statute,—the condition of total or partial dependence upon a man at the time of his death introduces an idea wholly foreign to the common law. I can see no other construction for this provision except that the ground of liability is whether the wages of the workman at the time of his death were in fact applied to the maintenance of the person who is making the claim." Lord Ardwell observed that "it would be establishing a very hard precedent, and a precedent that might work very badly in practice, to say that a daughter who acts as the appellant did here shall not only lose the opportunity of saving money, but shall have no claim under this act in respect of her father's death."

<sup>63</sup> *Krzus v. Crow's Nest Pass Coal Co.* (1911) 16 B. C. 120, 17 West. L. Rep. (Can.) 687.

McDonald, Ch. J. and Galliher, J., considered that the scheme of the act was to shift the onus of providing for the destitute from the state to the employer; and as nonresident aliens could not become a burden on the state, it ought not to be inferred, notwithstanding the general language of the statute, that the legislature intended to impose an obligation on the employer to compensate aliens.

<sup>64</sup> [1912] A. C. (Eng.) 590, 81 L. J. P. C. N. S. 227, [1913] W. C. & Ins. Rep. 38, 107 L. T. N. S. 77, 28 Times L. R. 488, 56 Sol. Jo. 632, 6 B. W. C. C. 270, Ann. Cas. 1912D, 859. Lord Atkinson, after observing that the sole question for decision was whether the fact that the widow was an alien, resident in Austria, prevented the plaintiff, as legal representative of deceased, from recovering compen-

Columbia act parents must show that they had a reasonable expectation of pecuniary benefit from a continuance of the life of the workman.<sup>65</sup>

Whether a woman living apart from her husband is dependent upon him or not is a question of fact under the western Australian act.<sup>66</sup>

Those who are partially dependent upon the injured employee are left by the Quebec act to their remedy under the Civil Code, their right to recover continuing to be subject to the obligation to prove that the accident was attributable to an "offense, or quasi offense, of the employer."<sup>67</sup>

*XVI. Appeals in Scotland where an action is raised independently of the act (§ 14).*

*a. Text of § 14.*

Section 14. In Scotland, where a workman raises an action against his employer, independently of this act, in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised

sation under the provincial act, since he would hold it, if recovered, for her benefit, said: "It is not insisted that the provincial statute shall operate extraterritorially. It is insisted that by its express words it imposes on the employer a liability to compensate his workmen for personal injuries by accident arising out of and in the course of the employment which he carries on, and in which they work. Where that employment is carried on in the province of British Columbia, one of the results of this intraterritorial operation of the statute may, the respondents admit, possibly be that in some cases a nonresident alien may derive a benefit under it; but their Lordships think that if the liability thus expressly imposed is to be cut down at all, or if the employer is to be relieved from it to any extent, this must be done either by some provision of the statute itself, or of the schedules attached to it, either expressed or to be clearly implied, and not by conjectures as to the policy of the act not suggested by its language."

In *Varesick v. British Columbia Copper Co.* (1906) 12 B. C. 286, the judge of the county court apparently assumed that alien dependents residing abroad were entitled to compensation under the act, but compensation was denied upon the ground that it was not shown that the applicants were dependents.

<sup>65</sup> In *Brown v. British Columbia Electric R. Co.* (1910) 15 B. C. 350, there was evidence that the deceased workman had on two occasions sent money to his parents in a foreign country; but it also appeared that they had in the first instance assisted him by advancing money for his passage L.R.A.1916A.

in the sheriff court and concluding for damages under the employers' liability act 1880, or alternatively at common law or under the employers' liability act 1880, shall, notwithstanding anything contained in that act, not be removed under that act or otherwise to the court of session, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the second schedule to this act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this act shall apply [new].

*b. Effect of this section.*

Section 14 of the act provides that in Scotland, where a workman raises an action in the sheriff's court against his employer independently of the act, and concluding for damages under the employers' liability act of 1880, or alternatively at common law or under the employers' liability act of 1880, the action shall not be remitted to the court of sessions except upon an appeal on a

to Canada. Held, that the parents were not entitled to maintain the action as "dependents," inasmuch as they had failed to show that they had "any reasonable expectation of pecuniary benefit" from the deceased.

To the same effect, *Varesick v. British Columbia Copper Co. (B. C.) supra.*

<sup>66</sup> A wife who had been separated from her husband for sixteen years, until the time when she spent a few days in the same house with him, but not as his wife, and who for a considerable portion of the period of separation had lived in adultery with another man, is not a dependent upon the husband. *Allan v. Oroya Brownhill Co.* (1910) 12 West. Australian L. R. 1.

A woman living apart from her husband may be found to be in fact dependent upon the earnings of a deceased son who, with several other sons, had lived with her and contributed to her support, although her husband lives in the same town, and she has never taken any steps to procure maintenance from him. *Kilgariff v. Associated Gold Mines* (1910) 12 West. Australian L. R. 73.

<sup>67</sup> An ascendant of whom a deceased employee was not "the only support" is not within the class of persons (Rev. Stat. Quebec, art. 7323) to whom article 7335 of the Revised Statutes of Quebec declares that the employers shall be liable "only for the compensation prescribed by this subsection," and his legal right of action under article 1056 of the Civil Code has not been taken away. *Lamontagne v. Quebec R. Light, Heat & P. Co.* (1914) 50 Can. S. C. 423.



question of law. Section 13 provides that any reference to a workman shall, if the workman be dead, include a reference to his personal representative or to his dependents. Under these provisions a question has arisen whether the father of a deceased workman was entitled to have his action remanded to the court of session for a jury trial. The House of Lords did not directly decide the question,<sup>68</sup> but the court of session, in a subsequent decision, took the position that the father did not have such right.<sup>69</sup>

**XVII. Termination of contracts relieving employers from liability; recertification of schemes (§ 15).**

**a. Text of § 15.**

Section 15 (1) Any contract (other than a contract substituting the provisions of a scheme certified under the workmen's compensation act 1897 for the provisions of that act) existing at the commencement of this act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this act.

(2) Every scheme under the workmen's compensation act 1897, in force at the commencement of this act, shall, if recertified by the registrar of friendly societies, have effect as if it were a scheme under this act.

(3) The registrar shall recertify any such scheme if it is proved to his satisfaction that the scheme conforms, or

has been so modified as to conform, with the provisions of this act as to schemes.

(4) If any such scheme has not been so recertified before the expiration of six months from the commencement of this act, the certificate thereof shall be revoked.

[Section 15 is an elaboration of § 9 of the earlier act, the additions being sufficiently indicated in the text itself.]

**b. Effect of this section.**

A scheme of compensation under § 3 of the act of 1897 does not, unless recertified under § 15 of the act of 1906, apply to an accident happening after the act came in operation, but within the six months mentioned in § 15, subs. 4.<sup>70</sup>

A workman, who entered on his employment after July 1st, 1907, is not barred from obtaining compensation under that act by having agreed to accept the provisions of the scheme certified under the act of 1897, but which had not been recertified under the act of 1906 before the employment was entered into.<sup>71</sup>

The six months allowed for recertifying schemes under the act of 1906 "from the commencement of this act" run from July 1, 1907, the date when the act took effect.<sup>72</sup>

It is not necessary that a ballot of the workmen shall be taken before the registrar can recertify his scheme under § 15.<sup>73</sup>

**XVIII. Repealing clause (§ 16).**

**a. Text of § 16.**

Section 16 (1) This act shall come into operation on the 1st day of July, 1907, but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not

<sup>68</sup> Where a father whose son had met his death by accident sought damages either at common law or alternatively under the employers' liability act of 1880, from the employers of the son, the father is entitled to have the cause remitted for trial by jury to the court of session; for if such right was taken away by § 13 and § 14 of the workmen's compensation act, it was restored by the sheriff court act of 1907, § 30. *Banknock Coal Co. v. Lawrie* [1912] A. C. (Eng.) 105, 81 L. J. P. C. N. S. 89, 106 L. T. N. S. 283, [1912] W. C. Rep. 1, 5 B. W. C. C. 209, 28 Times L. R. 136, [1912] S. C. 20, 49 Scot. L. R. 98.

<sup>69</sup> An action by a father against the employers of his deceased son, at common law and under the liability act of 1880, is an action "by a workman against his employer," within the meaning of § 14 of the act, and cannot be appealed to the court L.R.A.1916A.

of sessions otherwise than by appeal on a question of law. *Cook v. Bonnybridge Silica & Fireclay Co.* (1914) 51 Scot. L. R. 529, 7 B. W. C. C. 907.

<sup>70</sup> *Moss v. Great Eastern R. Co.* [1909] 2 K. B. (Eng.) 274, 78 L. J. K. B. N. S. 1048, 100 L. T. N. S. 747, 25 Times L. R. 466.

<sup>71</sup> *Wallace v. Hawthorne* [1908] S. C. 713, 45 Scot. L. R. 547.

<sup>72</sup> *Morter v. Great Eastern R. Co.* (1908; C. C.) 126 L. T. Jo. (Eng.) 171, 2 B. W. C. C. 480.

<sup>73</sup> *Godwin v. Lord Comrs. of Admiralty* [1913] A. C. (Eng.) 638, 82 L. J. K. B. N. S. 1126, 109 L. T. N. S. 428, 29 Times L. R. 774, [1913] W. N. 267, 6 B. W. C. C. 788, affirming Court of Appeal [1912] 2 K. B. 26, 81 L. J. K. B. N. S. 532, 106 L. T. N. S. 136, 28 Times L. R. 229, [1912] W. C. Rep. 49, 5 B. W. C. C. 229.

apply in any case where the accident happened before the commencement of this act.

(2) The workmen's compensation acts 1897 and 1900 are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this act, except to the extent to which this act applies to those cases.

*b. Effect of this section.*

An appeal to the House of Lords from a decision of the court of session reversing a decision of an arbiter based on the report of a medical referee will not lie under sched. II., ¶ 17 (b), of the act of 1906, in a proceeding under the act of 1897 in regard to an accident which occurred before the commencement of the act of 1906, notwithstanding the exception in § 16, subs. 1, of the latter act, as to "references to medical referees and proceedings consequential thereon." <sup>74</sup>

**XIX. Citing clause (§ 17).**

*a. Text of § 17.*

Section 17. This act may be cited as the workmen's compensation act 1906.

**XX. Compensation recoverable (sched. I).**

*a. Text of schedule I.*

First Schedule. Scale and Conditions of Compensation.

(1) The amount of compensation under this act shall be: (a) where death results from the injury—

(i.) if the workman leaves any dependents wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this act, and any lump sum paid in redemption thereof, shall be deducted from such sum; and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii.) if the workman does not leave

any such dependents, but leaves any dependents in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this act, to be reasonable and proportionate to the injury to the said dependents; and

(iii.) if he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding £10;

(b) Where total or partial incapacity for work results from injury, a weekly payment during the incapacity not exceeding 50 per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer such weekly payment not to exceed £1: Provided that (a) if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week; and (b) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than 20s., 100 per cent shall be substituted for 50 per cent of his average weekly earnings, but the weekly payment shall in no case exceed 10s.

[The proviso under ¶ 1 (b) is new; otherwise the paragraph is practically the same as in the original act.]

(2) For the purpose of the provisions of this schedule relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed:

(a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided, that where, by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

(b) Where the workman had entered

<sup>74</sup> Mackay v. Rosie [1912] S. C. (H. L.) 7, 49 Scot. L. R. 48, 56 Sol. Jo. 48, 105 L. T. N. S. 682, 5 B. W. C. C. 181.  
L.R.A.1916A.



into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident;

(c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause;

(d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings.

[Paragraph 2 is new.]

(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.

[Paragraph 2 of the original schedule reads as follows:

In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity.]

(4) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this act in relation to compensation, shall be suspended until L.R.A.1916A.

such examination has taken place [¶ 3 of the original act].

(5) The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into county court, and any sum so paid into court shall, subject to rules of court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this act; and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in:

Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependents, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due [similar to ¶ 4 of the original act].

(6) Rules of court may provide for the transfer of money paid into court under this act from one court to another, whether or not the court from which it is to be transferred is in the same part of the United Kingdom as the court to which it is to be transferred [new].

(7) Where a weekly payment is payable under this act to a person under any legal disability, a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of this schedule with respect to sums required by this schedule to be paid into court shall apply to sums paid into court in pursuance of any such order [new].

(8) Any question as to who is a dependent shall, in default of agreement, be settled by arbitration under this act, or, if not so settled before payment into court under this schedule, shall be settled by the county court, and the amount payable to each dependent shall be settled by arbitration under this act, or, if not so settled before payment into court under this schedule, by the county court. Where there are both total and partial dependents, nothing in this schedule shall be construed as preventing the compensation being allotted partly to the total and partly to the partial dependents [similar to 5th paragraph of the act of 1897; last sentence is new].

(9) Where, on application being made in accordance with rules of court, it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various de-

pendents, or for any other sufficient cause, an order of the court, or an award as to the apportionment amongst the several dependents of any sum paid as compensation, or as to the manner in which any sum payable to any such dependents is to be invested, applied, or otherwise dealt with, ought to be varied, the court may make such order for the variation of the former order or the award as in the circumstances of the case the court may think just [new].

(10) Any sum which under this schedule is ordered to be invested may be invested in whole or in part in the Postoffice Savings Bank by the registrar of the county court in his name as registrar [¶ 7 of the original act].

(11) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Postoffice Savings Bank, or be accepted by the Postmaster General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums [¶ 8 of the original act].

(12) No part of any money invested in the name of the registrar of any county court in the Postoffice Savings Bank under this act shall be paid out, except upon authority addressed to the Postmaster General by the Treasury or, subject to regulations of the Treasury by the judge or registrar of the county court [¶ 9 of the original act].

(13) Any person deriving any benefit from any moneys invested in a postoffice savings bank under the provisions of this act may nevertheless open an account in a postoffice savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank [¶ 10 of the original act].

(14) Any workman receiving weekly payments under this act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

[The following clause, forming part of the first sentence in ¶ 11 of the earlier L.R.A.1916A.

schedule, was omitted from ¶ 14 of the later act:

But if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition, when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this act, as mentioned in the second schedule to this act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition].

(15) A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (4) or paragraph (14) of this schedule, otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations.

Where a workman has so submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on application being made to the court by both parties, may, on payment by the applicants of such fee, not exceeding £1, as may be prescribed, refer the matter to a medical referee.

The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified.

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this paragraph shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman.

If a workman, on being required so to



do, refuses to submit himself for examination, by a medical referee to whom the matter has been so referred as aforesaid, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under this act in relation to compensation, or, in the case of a workman in receipt of a weekly payment, his right to that weekly payment, shall be suspended until such examination has taken place.

Rules of court may be made for prescribing the manner in which documents are to be furnished or served and applications made under this paragraph, and the forms to be used for those purposes, and, subject to the consent of the Treasury, as to the fee to be paid under this paragraph [new].

(16) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided; and the amount of payment shall, in default of agreement, be settled by arbitration under this act; Provided that where the workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1 [same as ¶ 12, except that the proviso is new].

(17) Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Postoffice Savings Bank, purchase an annuity for the workman equal to 75 per cent of the annual value of the weekly payment, and, as in any other case, may be settled by arbitration under this act; and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum [elaboration of ¶ 13 of the original act].  
L.R.A.1916A.

(18) If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature. If the medical referee so certifies, the workman shall be entitled to receive quarterly the amount of the weekly payments accruing due during the preceding quarter so long as he proves, in such manner and at such intervals as may be prescribed by rules of court, his identity and the continuance of the incapacity in respect of which the weekly payment is payable [new].

(19) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same [same as ¶ 14 of the original act].

(20) Where under this schedule a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension [new].

(21) Where a scheme certified under this act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subs. of § 8, § 16, and § 41 of the friendly societies act 1896, shall not apply to such society in respect of such scheme [¶ 15 of the original act].

(22) In application of this act to Ireland the provisions of the county officers and courts (Ireland) act 1877, with respect to money deposited in the Postoffice Savings Bank under that act shall apply to money invested in the Postoffice Savings Bank under this act [¶ 17 of the original act].

**b. Meaning of phrase "where death results from the injury" (¶ 1a).**

Death may be the result of the injury within the meaning of this paragraph of the act, even though, in fact, it may not be the natural or probable consequence thereof;<sup>75</sup> as where the death resulted

<sup>75</sup> Dunham v. Clare [1902] 2 K. B. (Eng.) 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645, 4 W. C. C. 102. In this case a workman injured his foot and erysipelas supervened. Collins, M. R., said: "It is incumbent upon the applicant for compensation to show that there was an accident which caused injury, and that death resulted from that injury. When the applicant has shown that, he has done all that is necessary to establish the claim

from a disease caused by the accident;<sup>76</sup> and where it is caused by the second administration of an anæsthetic for the performance of a second operation, necessary to secure the full results anticipated by the first operation.<sup>77</sup> So, death may be found to be the result of an injury where such injury left the workman in a debilitated condition, and unable to resist a disease subsequently intervening.<sup>78</sup>

For decisions holding that incapacity from a disease following an accident may be considered as entitling the workman to compensation, although such disease

to compensation. It is a question of fact whether the death did result from the injury caused by the accident. If it did, then it does not matter how improbable or unnatural it might have appeared that death should result.<sup>79</sup>

Where a workman suffered an accident which caused a rupture, and necessitated an operation, and at the time of the operation an old hernia was operated upon, and the workman died eight months after, having shown signs of heart failure soon after the operation, the arbitrator may find that the death resulted from the accident, where the medical evidence indicated that, in order properly to operate for the second rupture, the first one must also be operated for. *Mutter v. Thomson* [1913] W. C. & Ins. Rep. 241, [1913] S. C. 619, 50 Scot. L. R. 447, 6 B. W. C. C. 424.

The fact that a workman who, after receiving an injury, was taken to a hospital, and thereafter was found to be afflicted with pneumonia, subsequently went to his home contrary to the advice of his doctor, and died two days afterward, does not necessarily preclude a finding that his death "results from the injury." *Dunnigan v. Cavan* [1911] S. C. 579, 48 Scot. L. R. 459, 4 B. W. C. C. 386.

It may be found that death resulted from the injury where the workman had received a heavy blow on the back, and subsequently died from a clot of blood on the lungs, which resulted from an operation made necessary by the diseased condition caused by the blow on the back. *Lewis v. Port of London Authority* (1914) 58 Sol. Jo. (Eng.) 686, 7 B. W. C. C. 577.

<sup>76</sup> Death from epilepsy caused by a piece of the skull being detached and imbedded in the brain as the result of a blow on the head is due to an accident, although the death occurred a year and a half after the blow was received. *Butt v. Gellyceridrin Colliery Co.* (1909) 3 B. W. C. C. (Eng.) 44.

Death may be found to be the result of an injury where a bricklayer returned home at night with a wound on his thumb, and about two weeks afterward an abscess formed in the armpit, and the man died soon after from septic poisoning, and the doctor who treated him believed that the poison got into his system from the wound, the period L.R.A.1916A.

was not the probable result of the accident, see cases cited on ante, 37.

In one case the court evidently took the view that death from suicide, committed while the workman was insane as a result of the injury, may be found to be due to accident.<sup>79</sup>

But insanity cannot be inferred merely from the fact that a workman who had received an injury to his eye, and was suffering great pain, committed suicide, although there was no other reason except the injury advanced for the act.<sup>80</sup>

Employers are not estopped from denying that the death of a workman

of incubation being such as would generally intervene between an accident and an abscess of such character. *Fleet v. Johnson* (1913) W. C. & Ins. Rep. (Eng.) 149, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60.

See also *Dunham v. Clare* (Eng.) supra.

<sup>77</sup> *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. (Eng.) 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430, 2 B. W. C. C. 342.

<sup>78</sup> The arbitrator may find that death results from the injury where the workman fell from a ladder and received a severe shaking and bruising and an injury to his ankle, and he died about a month thereafter of appendicitis and consequent peritonitis, and during the month between the injury and death he was in a very low state of health and suffered severe pain. *Euman v. Dalziel* [1913] S. C. 246, 50 Scot. L. R. 143, (1913) W. C. & Ins. Rep. 49, 6 B. W. C. C. 900.

Death may be found to result from the injury although the workman had recovered from the direct effects of it, and the death occurred thirteen months after, if the workman was in a debilitated condition, and the bronchitis of which he died only hastened his death. *Thoburn v. Bedlington Coal Co.* (1911) 5 B. W. C. C. (Eng.) 128.

<sup>79</sup> In *Malone v. Cayzer* [1908] S. C. 479, 45 Scot. L. R. 351, 1 B. W. C. C. 27, it was held that a claim by a widow should not be dismissed on the ground of the irrelevancy of her plea that an accident to her husband's eye which rendered him nearly blind, and which so worked upon his nerve that he became insane and eventually committed suicide, was the cause of his death. The appellate court held that it was not clear that the chain of causation could be made out, but that the sheriff substitute should have made inquiry into the matters alleged.

<sup>80</sup> There can be no compensation recovered for the death by suicide of a workman who had suffered an injury to his eye, and the doctor thought that he might lose the sight of it, where there was no evidence of insanity on the part of the workman. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 84 L. J. K. B. N. S. 847,



was due to accident merely because they had made an agreement with the workman during his lifetime to pay him compensation as long as his incapacity continued; it was still open for them to show that the death was due to some other cause.<sup>81</sup>

The burden of proof is on the applicant to show that the death or injury was due to the alleged accident.<sup>82</sup> That death resulted from the accident may be proved by legitimate inference from the circumstances established, but there must be something more than guess, conjecture, or surmise.<sup>83</sup>

The court of appeal will not review the findings of fact by the county court judge as to whether the death was or was not caused by the accident.<sup>84</sup> The county court judge is justified in relying upon the medical opinion of the assessor as to the cause of the death.<sup>85</sup>

*c. Amount recoverable in case of death by persons dependent upon the workman's earnings (¶ 1a).*

The effect of schedule I. (1) (a) (i) as a whole, is that, where death results

from the injury, and the workman leaves dependents who were wholly dependent on his earnings, the amount of compensation is to be a sum equal to his earnings in the employment of the same employer during the three years next preceeding the injury, or, where the employment has been less than the three years, a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case is the compensation to exceed £300 or be less than £150. The maximum and minimum amounts of compensation which are specified apply whether the workman has been working more than the three years or a less period.<sup>86</sup>

In determining the sum, "reasonable and proportionate to the injury," which is to be awarded to partial dependents, the funeral expenses of the workman may be taken into consideration.<sup>87</sup> What compensation is "reasonable and proportionate to the injury" to a dependent partially dependent upon the earnings of a deceased workman is a question of fact for the county court judge.<sup>88</sup> In a proper case, he may award a partial dependent the sum of £300 compensation,

8 B. W. C. C. 69, [1915] W. N. 43, 59 Sol. Jo. 233.

<sup>81</sup> *Cleverley v. Gaslight & C. Co.* (1907; H. L.) 24 Times L. R. (Eng.) 93, 1 B. W. C. C. 82.

<sup>82</sup> *Dean v. London & N. W. R. Co.* (1910) 3 B. W. C. C. (Eng.) 351.

<sup>83</sup> The county court judge cannot find that death resulted from the accident where it appeared that death was the result of peritonitis following a perforation of the bowels, which perforation was shown upon a post mortem examination not to have been the result of an accident but of some unknown cause or of appendicitis from which the workman was suffering prior to the accident. *Woods v. Wilson* [1913] W. C. & Ins. Rep. (Eng.) 569, 29 Times L. R. 726, 6 B. W. C. C. 750.

Where a workman died four years after the accident, and two doctors said the death was due to the accident, and two others thought the death was not due to the accident, the county court judge is justified in holding that the death did not result from the injury. *Taylorson v. Framwell-gate Coal & Coke Co.* [1913] W. C. & Ins. Rep. (Eng.) 179, 6 B. W. C. C. 56.

In *Southall v. Cheshire County News Co.* (1912) 5 B. W. C. C. (Eng.) 251, where a workman, while suffering from his injuries, went out of his house early in the morning, and his body was afterwards found in a canal more than 400 yards from the house, and there was no evidence as to how he came by his death, *Cozens-Hardy, M. R.*, said: "The judge seems to have thought it was more likely that the man

committed suicide than anything else. The judge is not entitled to act upon a surmise of that nature. It is not at all a case in which there are facts from which an inference may be drawn."

<sup>84</sup> *Cameron v. Port of London Authority* (1912) 5 B. W. C. C. (Eng.) 416.

<sup>85</sup> *Lewis v. Port of London Authority* [1914] 58 Sol. Jo. (Eng.) 686, 7 B. W. C. C. 577.

<sup>86</sup> *Forrester v. McCallum* (1901) 3 Sc. Sess. Cas. 5th series, 650, 38 Scot. L. R. 448, 8 Scot. L. T. 486, reconsidering and disapproving *Doyle v. Beattie* (1900) 2 Sc. Sess. Cas. 5th series, 1166, 37 Scot. L. R. 915, 8 Scot. L. T. 131.

<sup>87</sup> *Bevan v. Crawshay Bros.* [1902] 1 K. B. (Eng.) 25, 71 L. J. K. B. N. S. 49, 85 L. T. N. S. 496, 50 Week. Rep. 98; *Murray v. Gourlay* [1908] S. C. 769, 45 Scott. L. R. 577; *Hughes v. Summerlee & M. Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 784.

<sup>88</sup> An award of compensation by the county court judge without stating how he arrived at that amount will not be disturbed on appeal where it appears that the amount awarded was £5 less than the maximum which could have been awarded, and there was evidence that the applicant, the widow of the deceased workman, was earning something less than 2s. a week herself, there being no evidence to show that the county court judge had misdirected himself. *Osmond v. Campbell*, [1905] 2 K. B. (Eng.) 852, 75 L. J. K. B. N. S. 1, 54 Week. Rep. 117, 93 L. T. N. S. 724, 22 Times L. R. 4.

which is the maximum that could be awarded for total dependency.<sup>89</sup>

Where the county court judge awards a certain sum to a dependent, he must find whether or not the dependent was totally or partially dependent.<sup>90</sup> But the existence of persons wholly dependent does not exclude partial dependents from sharing in the compensation recovered.<sup>91</sup>

Dependents are entitled to compensation upon the death of the workman though he had been receiving compensation during his lifetime.<sup>92</sup> They are not precluded from recovering the compensation due them under the act, by any action on the part of the workman, except that the employer is to be credited with any compensation which he had paid to the workman himself.<sup>93</sup> And their right to compensation not being a derivative claim, they are not estopped by an award terminating compensation

to the workman during his lifetime.<sup>94</sup> But a statutory election by a workman, as between his employer and a third person whose negligence caused the injury, is binding not only upon the workman, but also upon his dependents. See ante, 101.

Upon the death of the sole dependent, his representative is entitled to claim all that the dependent might have claimed. It has been so held in a case in which the claim had been made by the dependent during his lifetime,<sup>95</sup> and also in a case in which the dependent had died without making any claim whatsoever.<sup>96</sup>

Where the mother of a deceased workman received from him a regular weekly allowance and also received weekly relief from the guardians of the poor, the proper method of computing the compensation is to take the deceased's earnings on the three year basis and deduct from that the amount the dependent

<sup>89</sup> *Cheverton v. Oceanic Steam Nav. Co.* [1913] W. R. C. & Ins. Rep. (Eng.) 462, 29 Times L. R. 658, 6 B. W. C. C. 574.

<sup>90</sup> *Cheverton v. Oceanic Steam Nav. Co.* (1913) 6 B. W. C. C. (Eng.) 253.

<sup>91</sup> *Robinson v. Anon* (1904; C. C.) 39 L. J. (Eng.) 164, 6 W. C. C. 117, disapproving *Fagan v. Murdoch* (1899) 1 Sc. Sess. Cas. 5th series, 1179, 36 Scot. L. R. 921, 7 Scot. L. T. 113.

<sup>92</sup> *O'Keefe v. Lovatt* (1901) 18 Times L. R. (Eng.) 57.

<sup>93</sup> The mere fact that a workman who has been receiving compensation goes back to his work, nothing being said by either the workman or the employer as to the discontinuance of the compensation, does not show that he had abandoned his right to further compensation; and even if he had, he cannot deprive his dependents under the act, except that the employer is entitled to credit for what he had paid the workman. *Williams v. Vauxhall Colliery Co.* [1907] 2 K. B. (Eng.) 433, 76 L. J. K. B. N. S. 854, 97 L. T. N. S. 559, 23 Times L. R. 591.

In *Howell v. Bradford* (1911) 104 L. T. N. S. (Eng.) 433, it was held that the act of an injured workman in signing a receipt as "being in full satisfaction and liquidation of all claims under the employers' liability act of 1880 and the common law in respect of the injuries, whether now or hereafter to become manifest, arising, directly or indirectly, from an accident which occurred" to him, would not bar his dependents from subsequently claiming compensation under the act, they being barred merely from recovering under the act to the extent of the benefits received by him.

Statements of the deceased workman are not admissible as against his dependents, since the applicants have, as dependents, a direct statutory right against the employer, and the applicants do not de-

rive their title to compensation by derivation from the workman. *Tucker v. Oldbury Urban Dist. Council* [1912] 2 K. B. (Eng.) 317, 81 L. J. K. B. N. S. 668, 106 L. T. N. S. 669, [1912] W. C. Rep. 238, [1912] W. N. 96, 5 B. W. C. C. 296.

<sup>94</sup> An award terminating weekly payments to an injured workman is not a bar to a claim for dependents filed after the death of the workman. *Jobson v. Cory* (1911) 4 B. W. C. C. (Eng.) 284.

<sup>95</sup> If the sole dependent dies after making a claim, but before the award is made, the claim survives. *Darlington v. Roscoe* [1907] 1 K. B. (Eng.) 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167.

<sup>96</sup> *United Collieries v. Simpson* [1909] A. C. (Eng.) 383, 78 L. J. C. P. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308, affirming [1908] S. C. 1215, 45 Scot. L. R. 944, 1 B. W. C. C. 289. In this case the dependent died without making any claim, and a claim was subsequently filed in behalf of her personal representative. The Lord Chancellor said: "The act does not require that the dependent himself should make the claim, and I do not see why that right to make the claim should not pass to the executor. It seems to me, therefore, that, as the person represented by the respondent was the only dependent, her representative may properly claim all that she was entitled to, the right being transmissible as property. If there had been several dependents, the law would not be different, but the discretion of the county court judge or sheriff in apportioning might very likely render the proceedings unprofitable. No doubt this act was intended to save dependents from the loss they might sustain by being deprived of the support they previously had from the deceased workman,



would have received from the guardians during the three years.<sup>97</sup>

In determining the question of the dependency of a father on the earnings of his son, the county court judge is not precluded by law from making a deduction in respect of the cost of the son's maintenance.<sup>98</sup> But he is not precluded from taking into account as against the cost of maintenance of the son, the pecuniary benefit, if any, of the services rendered by the son to the father in the conduct of the latter's business.<sup>99</sup> Help given by younger members of the family who live together should not be treated as a deduction from a

workman's wages, in the absence of an express contract.<sup>1</sup>

As to the manner of paying the money to the dependent, see post, 162. And as to the determination of the question, Who are dependents? see ante, 121.

*d. Amount recoverable by workman totally or partially incapacitated (§ 1b).*

The expression "incapacity for work" includes incapacity to get work as well as incapacity to do work.<sup>2</sup> So a workman may be incapacitated within the meaning of the statute although he is able to resume his work, if his condition is such that he cannot get work because

and if the dependents themselves die they require it no longer. And it seems anomalous to enforce payment when no dependent is still living to require support. The act, however, provides a fixed sum, and this must be taken as the statutory provision, whether in the event it is needed or not. Perhaps if this result had been foreseen, it might have been guarded against; but that cannot affect the judgment of a court of law."

The above decision disapproves *O'Donovan v. Cameron* [1901] 2 I. R. 633, 34 Ir. Law Times, 169, where it was held that where the sole dependent of a deceased workman dies after having served notice of the accident, but before any claim for compensation has been made, the right to recover compensation does not pass to the personal representative of the dependent.

*Harvey v. North Eastern Marine Engineering Co.* (1902; C. C.) 5 W. C. C. (Eng.) 30, 113 L. T. Jo. 499, holding that the personal representative of a dependent who died after filing a claim, but before an award was made, cannot continue the proceeding, as the dependent's right to compensation died with him, must be considered as overruled.

<sup>97</sup> *Byles v. Pool* (1908; C. C.) 126 L. T. Jo. (Eng.) 287, 73 J. P. 104, 53 Sol. Jo. 215, 2 B. W. C. C. 484.

<sup>98</sup> *Tamworth Colliery Co. v. Hall* [1911] A. C. (Eng.) 665, 105 L. T. N. S. 449, 55 Sol. Jo. 615, 4 B. W. C. C. 313, reversing [1911] 1 K. B. (Eng.) 341, 80 L. J. K. B. N. S. 304, 103 L. T. N. S. 782, 4 B. W. C. C. 107. *Osmond v. Campbell* [1905] 2 K. B. (Eng.) 852, 54 Week. Rep. 117, 22 Times L. R. 4, 75 L. J. K. B. N. S. 1, 93 L. T. N. S. 724, in so far as it may hold that upon the question of partial dependency the county court judge is not entitled to deduct from the earnings of a deceased workman the cost of his maintenance, was overruled.

The court of appeal has refused to interfere with the conclusion of the county court judge where, in the case of a person partially dependent upon a deceased workman, he estimated the workman's earnings upon the whole amount received, and not L.R.A.1916A.

upon the part thereof that went to the support of the dependent. *Littleford v. Connell* (1909) 3 B. W. C. C. (Eng.) 1. The decision in *Osmond v. Campbell* [1905] 2 K. B. (Eng.) 852, was followed.

See also *O'Neill v. Bansha Co-op Agri. & Dairy Soc.* [1910] 2 I. R. 324, 44 Ir. Law Times, 52.

<sup>99</sup> *Tamworth Colliery Co. v. Hall* [1911] A. C. (Eng.) 665, 105 L. T. N. S. 449, 55 Sol. Jo. 615, 4 B. W. C. C. 313.

<sup>1</sup> *Roper v. Freke* (1915) 31 Times L. R. (Eng.) 507.

<sup>2</sup> An accident which necessitates the removal of the left eyeball causes an "incapacity for work," although the sight of the eye had previously been lost, where the workman is unable to obtain work as being "manifestly a one-eyed man." *Ball v. Hunt* [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, [1912] W. N. 149, [1912] W. C. Rep. 261, 5 B. W. C. C. 459, reversing [1911] 1 K. B. 1048, 80 L. J. K. B. N. S. 655, 104 L. T. N. S. 327, 27 Times L. R. 323, 55 Sol. Jo. 383, 4 B. W. C. C. 225. In a dissenting opinion in the court of appeal, *Fletcher Moulton, L. J.*, whose views were in effect adopted in the House of Lords, said: "In the phrase 'incapacity for work' in sched. I. (1) the word 'work' is used in the sense of doing work as a workman, i. e., for wages or other remuneration. It is to the capacity for earning wages as a workman that the whole scheme of the act relates. It is beyond question that the amount of the compensation depends on the change produced in this, and, in my opinion, the right to receive compensation depends on it also. A capacity to do certain physical acts, but not to do them as a workman for wages, is not in my opinion a capacity to do that work within the meaning of the act. It follows, therefore, that as a general principle a workman has brought himself within the act when he shows that by reason of an accident arising out of and in the course of his employment he has sustained an injury which lessens his earning capacity, and this, whether or not it has diminished his physical capacity for doing his work."

he is liable to break down at any time.<sup>3</sup> And incapacity may "result from the injury" although it is not the probable result thereof.<sup>4</sup>

A workman who has shown that he was injured by accident arising out of and in the course of his employment is not disentitled to be paid compensation by reason of the supervention of some cause not due to the accident, which equally results in incapacity for work; as where heart disease has supervened,<sup>5</sup> or where the workman, while receiving compensation, was convicted of a crime and sentenced to a term of imprisonment.<sup>6</sup> An earlier decision by a county court judge was to the contrary.<sup>7</sup>

Incapacity may be found to exist as the result of an injury although the workman was partially incapacitated before the injury.<sup>8</sup> And the nervous and mental as well as the physical condition

of an injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity.<sup>9</sup> But mere mental brooding over an accident, causing inability to work, is not an incapacity under the act.<sup>10</sup> Although a workman was advised by his doctor not to continue his work in a coal pit, the county court judge is not justified in awarding him full compensation upon the ground that he acted reasonably in following his doctor's advice, but he must find out his capacity for work.<sup>11</sup>

A workman who was twice injured may recover compensation for one of the injuries if it incapacitates him, although he is fully recovered from the other.<sup>12</sup>

The question as to what constitutes incapacity is to be determined by the facts of each case.<sup>13</sup> An unskilled la-

<sup>3</sup> A workman injured in the knee is entitled to full compensation where, although he is able to resume work, the knee is liable to break down at any time, and for that reason he is unable to procure work either from his former employer or elsewhere. *Thomas v. Fairbairne* (1911) 4 B. W. C. C. (Eng.) 195.

<sup>4</sup> In *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. (Eng.) 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622, 2 B. W. C. C. 357, the county court judge was held to have misdirected himself in holding that bronchitis and chronic asthma were not the natural result of injury to the workman where, because of his injury, it took him two hours to travel the distance of 1 mile to his home, during which he caught cold and chills which culminated in pneumonia, and bronchitis and chronic asthma supervened.

<sup>5</sup> *Harwood v. Wyken Colliery Co.* [1913] 2 K. B. (Eng.) 158, 82 L. J. K. B. N. S. 414, 108 L. T. N. S. 283, 29 Times L. R. 290, 57 Sol. Jo. 300, [1913] W. C. & Ins. Rep. 317, [1913] W. N. 53, 6 B. W. C. C. 225.

<sup>6</sup> *McNally v. Furness* [1913] 3 K. B. (Eng.) 605, 82 L. J. K. B. N. S. 1310, 109 L. T. N. S. 270, 29 Times L. R. 678, [1913] W. N. 239, 6 B. W. C. C. 664.

<sup>7</sup> *Clayton v. Dobbs* (1908; C. C.) 2 B. W. C. C. (Eng.) 488.

<sup>8</sup> Where it is proved that a disease would have produced total incapacity at a definite future time, but that the accident accelerated it, so as to produce present incapacity, compensation may be awarded for the period of incapacity attributable to the accident. *Ward v. London & N. W. R. Co.* (1901; C. C.) 3 W. C. C. (Eng.) 192.

Although a workman's eye was in such a condition that he was able to see only what came before the eye, compensation may be awarded for injury which necessi-

tated the removal of the eye. *Martin v. Barnett* (1910) 3 B. W. C. C. (Eng.) 146.

A miner whose left eye was affected by disease so as to be useless for underground work may be held to be suffering from incapacity resulting from an accident, where his right eye was injured to such an extent that it was of little use for underground work, although the condition of the left eye was neither caused nor aggravated by the accident. *Lee v. Baird* [1908] S. C. 905, 45 Scot. L. R. 717.

The county court judge is justified in finding that a workman who had suffered an injury to his eye was totally incapacitated where the medical referee found that the injured eye had only about  $\frac{1}{30}$  of the normal vision, and the right eye was not very good, although the medical referee was inclined to believe that he had better vision than he was willing to own. *James v. Mordey* (1913) 109 L. T. N. S. (Eng.) 377, 6 B. W. C. C. 680.

<sup>9</sup> *Turner v. Brooks* (1909) 3 B. W. C. C. (Eng.) 22.

<sup>10</sup> *Holt v. Yates* (1909) 3 B. W. C. C. (Eng.) 75.

<sup>11</sup> *Evans v. Cory Bros.* [1912] W. C. Rep. (Eng.) 199, 5 B. W. C. C. 272.

<sup>12</sup> Where a workman had been injured and was receiving compensation, and afterwards, while doing light work, received a further injury, it is error for the county court judge, upon a recovery from the second injury, to terminate all compensation without inquiry as to what incapacity remained from the first injury. *Wilkinson v. Frodingham Iron & Steel Co.* [1913] W. C. & Ins. Rep. (Eng.) 335, 6 B. W. C. C. 200.

<sup>13</sup> The county court judge is justified in finding that a man was totally incapacitated where his ankle was in such shape that he could hardly work at all and his place of work was 2 miles distant from his home, and the workman was so situated as



borer will not be presumed to be incapable of doing any work simply because he cannot do his old work.<sup>14</sup>

Inability to work, due to anything other than the accident, cannot be made

the basis of compensation.<sup>15</sup> Thus, if the incapacity is due simply to idleness, following the injury, the workman is not entitled to compensation.<sup>16</sup> Nor is the workman entitled to compensation if he

not to have a reasonable chance of obtaining other work which he could do, although other than the ankle he was healthy. *Beddard v. Stanton Ironworks Co.* [1913] W. C. & Ins. Rep. (Eng.) 535, 6 B. W. C. C. 627.

A waitress who because of an injury to her finger was unable to do her work as efficiently as before may be found to be entitled to compensation, although after receiving compensation for a time, she returned to her work at the former wages, where she voluntarily left the place upon complaint by her employers of her clumsiness due to the injury. *Ward v. Miles* (1911) 4 B. W. C. C. (Eng.) 182.

In *Doharty v. Boyd* [1909] S. C. (Scot.) 87, the arbitrator awarded compensation, finding that the workman was permanently incapacitated for work at his trade, and that there was no proof of his being able to work in his present condition. In an appeal the employer contended that there was no finding in fact to the effect that the workman was incapacitated for other work than stonebreaking. But the court refused to set aside the award. Lord McLaren said: "The statute does not say, incapacity for work of any description, but uses language of a more general nature, which I think has been properly chosen, because otherwise it might be open to an employer to state in defense some fanciful work which the injured workman might get, and might be supposed capable of performing. What, therefore, the sheriff-substitute had to consider was whether this was a substantial case of incapacity for work for a man in the grade of a stonebreaker. He is satisfied that this man is not fit for stonebreaking, and I can quite understand his taking the view that, if not fit for that, he is not fit for any other description of work."

A workman is entitled to an award of compensation where the arbitrator did not find that his partial incapacity, due to the accident, had ceased, but found merely that his total incapacity had ceased and that he was fit for light work, but had made no attempt to obtain it, and further found that he was still partially incapacitated, and that his partial incapacity was due in whole or in part to his failure to return when able to do so. *Devlin v. Chapel Coal Co.* (1914) 52 Scot. L. R. 83, as cited in *Butterworths' Dig.* 1914, col. 430.

<sup>14</sup> On an application to review it is a misdirection for the county court judge to refuse to review on the ground that the workman could not do his old work. *Cammell v. Platt* (1908) 2 B. W. C. C. (Eng.) 368.

<sup>15</sup> Compensation to a miner who had lost his right eye by an accident must be terminated upon his recovery from the accident and regaining ability to earn full wages, *L.R.A.* 1916A.

although after the accident an incipient cataract developed in the other eye and it was probable that in course of time he would lose the sight of that eye. *Hargreave v. Haughhead Coal Co.* [1912] A. C. (Eng.) 319, [1912] S. C. (H. L.) 70, 81 L. J. P. C. N. S. 167, 106 L. T. N. S. 468, [1912] W. C. Rep. 275, [1912] W. N. 79, 56 Sol. Jo. 379, 49 Scot. L. R. 474, 5 B. W. C. C. 445.

Where a broken arm was so badly set that the workman could not use his hand, and was incapacitated, and the employers claimed that the incapacity was due either to the negligence of the bonesetter or to the unreasonable refusal of the workman to have the arm rebroken and properly set, it is incompetent for the county court judge not to pass upon the question of the bonesetter's negligence and to award compensation after finding that the workman's refusal was not unreasonable. *Humber Towing Co. v. Barclay* (1911) 5 B. W. C. C. (Eng.) 142.

An application to review, and terminate payments being made under an agreement in respect to a certain accident, should be granted where it appeared that the disease from which the applicant had suffered was caused by another accident, and not the one embraced in the agreement. *Booth v. Carter* [1915] W. C. & Ins. Rep. (Eng.) 59, 8 B. W. C. C. 106.

<sup>16</sup> Incapacity due to idleness following the injury, and not to the injury itself, does not entitle the workman to compensation. *David v. Windsor Steam Coal Co.* (1911) 4 B. W. C. C. (Eng.) 177.

A workman who would be fit to work but for the fact that he had failed to take proper exercise is entitled to no more than a suspensory award. *Upper Forest & W. Steel & Tinplate Co. v. Grey* (1910) 3 B. W. C. C. (Eng.) 424.

Compensation will be terminated and a suspensory award refused, where it appears that the workman was able to do her ordinary work, and that any defect in her arm would be remedied by exercise, which she had not attempted to take. *Simpson v. Byrne* [1913] W. C. & Ins. Rep. (Eng.) 240, 47 Ir. Law Times, 27, 6 B. W. C. C. 455.

But the county court judge is not justified in holding that a workman was unreasonable in not going to work where a part of his little finger had been amputated and slight adhesions remained, and the employer maintained that by using the hand the adhesions would break down, but the workman, three days before the application for review, had had a second operation upon the advice of a doctor. *Burgess v. Jewell* (1911) 4 B. W. C. C. (Eng.) 145.

is a malingerer,<sup>17</sup> or merely feels nervous about going back to his work;<sup>18</sup> as where a workman has lost an eye and is fearful lest he may lose the other.<sup>19</sup> And the workman is not entitled to compensation if he is prevented from earning his old wages by the action of a trade union,<sup>20</sup> or by a strike,<sup>21</sup> or where, after recovering from an injury and returning to work, he loses his employment because of his own misconduct.<sup>22</sup> But the county judge is not justified in finding that a workman who loses his employment by one act of misconduct is not entitled to compensation.<sup>23</sup>

<sup>17</sup> The county court judge is justified in dismissing a workman's application for an increase in compensation, where there was no trace of any physical disability, and the evidence of the employer's doctor was to the effect that the workman was a deliberate and conscious malingerer, and was quite fit to go back to his old work at the time. *Ogden v. South Kirky, F. & H. Collieries* [1913] W. C. & Ins. Rep. (Eng.) 463, 6 B. W. C. C. 573.

<sup>18</sup> A workman who has recovered, but who feels nervous about going back to work at the same employment, is not entitled to compensation above a nominal award. *Pimms v. Pearson* (1909; C. C.) 126 L. T. Jo. (Eng.) 301, 2 B. W. C. C. 489.

<sup>19</sup> A workman who has lost an eye in his employment is not justified in refusing to go back to the employment merely because of the possible danger of losing the other eye. *Howards v. Wharton* [1913] W. C. & Ins. Rep. (Eng.) 504, 6 B. W. C. C. 614.

A workman who has lost the sight of one eye is not justified in refusing work which involves no more risk to a one-eyed man than to a two-eyed, man merely on the ground that he might lose the other eye. *Elliott v. Curry* (1912) 46 Ir. Law Times, 72, [1912] W. C. Rep. 188, 5 B. W. C. C. 584.

<sup>20</sup> Where a laborer who was injured while working at a wire stripping machine was, upon his return to work, unable to continue at work on the machine, not because of his condition, but because of the action of a trade union which compelled the employer to use at the machine only skilled workmen and members of the union, the workman is not entitled to compensation at the rate of wages that he was earning while at the machine, and in absence of any evidence as to his condition, all the court of appeals can do is to make the declaration of the employer's liability. *Thompson v. Johnson* [1914] 3 K. B. (Eng.) 694, [1914] W. N. 281, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 333, 7 B. W. C. C. 479.

<sup>21</sup> A goods porter in the service of a railroad company, who, after an injury for which he had received compensation, was employed as a mess room attendant, and, because of a strike on the railway, was unable to get work for four days, is not entitled to compensation, since his incapacity was the result of a strike, and was not due to his injury. *Woodhouse v. Midland R. Co.* [1914] 3 K. B. (Eng.) 1034, 30 Times L. R. 653, 83 L. J. K. B. N. S. 1810, 7 B. W. C. C. 690.

The workman must use all reasonable means to recover his capacity for work, and compensation need not be paid if he does not follow simple medical directions,<sup>24</sup> or if he refuses to undergo massage recommended by his own doctor and every other doctor connected with the case.<sup>25</sup> And he will be denied compensation where he unreasonably refuses to undergo an operation which is of a minor character, and which would, in the opinion of medical men, restore his earning capacity.<sup>26</sup> But is is otherwise

capacity for work was the result of a strike, and was not due to his injury. *Woodhouse v. Midland R. Co.* [1914] 3 K. B. (Eng.) 1034, 30 Times L. R. 653, 83 L. J. K. B. N. S. 1810, 7 B. W. C. C. 690.

<sup>22</sup> A workman who had been injured, and had received full compensation during the incapacity caused by such injury, and who had so far recovered as to be able to earn as much or more than before the injury, but who was prevented from so doing because of drink, is not entitled to a substantial award. *Hill v. Ocean Coal Co.* (1909) 3 B. W. C. C. (Eng.) 29.

<sup>23</sup> *White v. Harris* (1911) 4 B. W. C. C. (Eng.) 39.

<sup>24</sup> An employer is not bound to continue weekly payments to an injured workman when the continuance of his incapacity is due to his neglect to comply with certain simple medical directions which had been given to him. *Dowds v. Bennie* (1902) 5 Sc. Sess. Cas. 5th series, 268, 40 Scot. L. R. 219, 10 Scot. L. T. 439.

Where an injured worker refuses to follow a reasonable and safe course of conduct which would in all probability enable him to regain his usual health and strength, and his continued incapacity is attributed to such refusal, he is not entitled to receive further compensation under the act. *Gormley v. Brisbane Tramways Co.* (1909) *Queensl. St. Rep.* 329.

<sup>25</sup> *Wright v. Sneyd Collieries* (1915) 84 L. J. K. B. N. S. (Eng.) 1332.

<sup>26</sup> A workman by refusing to undergo an operation precludes himself from any right to receive further compensation, where the proposed operations are simple or minor operations, not attended with appreciable risk or serious pain, and are likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work. *Donnelly v. Baird* [1908] S. C. (Scot.) 536. Lord McLaren said: "There is, of course, no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work



if the operation is a serious one,<sup>27</sup> or if it is questionable whether it will benefit him,<sup>28</sup> or if his own doctor advises

at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.

. . . In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

A workman's refusal to undergo "a simple operation not attended with serious risk or pain, and . . . such as a reasonable man not claiming compensation for damages would for his own advantage and comfort elect to undergo," disentitles him to a continuance of substantial compensation. *Anderson v. Baird* (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 373.

If the operation is not serious, involving no appreciable risk, and is likely to remove his incapacity, he is not entitled to compensation if he refuses to have it performed. *Warneken v. Moreland* [1909] 1 K. B. (Eng.) 184, [1908] W. N. 252, 25 Times L. R. 129, 53 Sol. Jo. 134, 78 L. J. K. B. N. S. 332, 100 L. T. N. S. 12.

It is unreasonable for the workman to refuse to undergo a slight and trivial operation advised by the workman's doctor for his own good. *Paddington v. Stack* (1909) 2 B. W. C. C. (Eng.) 402.

A workman receiving compensation is not entitled to refuse to undergo an operation on the ground that he might risk his capacity to do other work, where the medical evidence was to the effect that the operation would not be attended with much pain or risk, and would in all probability restore the workman's capacity fully for doing work. *Walsh v. Loek* (1914) 110 L. T. N. S. (Eng.) 452, [1914] W. C. & Ins. Rep. 95, 7 B. W. C. C. 117.

The arbitrator may find that the incapacity of a workman is due to his refusal to have an operation performed, and not to the original accident, where the refusal was upon the advice of two doctors who, although they said that the operation was slight and there would be no danger attached to it, nevertheless considered that it would not remove the incapacity. *O'Neill v. Brown* [1913] S. C. 653, [1913] W. C. & Ins. Rep. 235, 50 Scot. L. R. 450, 6 B. W. C. C. 428. The court pointed out that the ground upon which the medical men were against the operation had nothing to do L.R.A.1916A.

against it.<sup>29</sup> Ordinarily the question whether the refusal to permit an operation is unreasonable depends on the facts

with the risk or pain involved, agreeing with the other medical men that the operation was an exceedingly simple one with no appreciable risk or danger, but their view simply was that it would not be of any use.

Although the facts may substantiate the respondent's claim that the incapacity could be removed by a slight operation which the applicant refused to have performed, the award of the arbiter will be affirmed, and the respondent's relief lies not in an appeal from the award, but in an application to have the award varied. *O'Neill v. Ropner* (1908), 42 Ir. Law Times 3, 2 B. W. C. C. 334.

In *Gilbert v. Fairweather* (1908; C. C.) 1 B. W. C. C. (Eng.) 349, the arbiter refused to vary the award or to terminate the compensation of a workman because he refused to submit to an operation which was of trivial character and practically certain to prove successful; the court said that, as a reasonable man, the workman should submit to the operation, but the matter was one for the court of appeal to pass upon.

<sup>27</sup> In *Rothwell v. Davies* (1903) 19 Times L. R. (Eng.) 423, compensation was held not to be barred because of the refusal of a workman to undergo an operation which, although probably successful, would be attended with a certain amount of risk.

<sup>28</sup> It cannot be said that a workman's refusal to undergo the operation of trephining was unreasonable, where it is admitted that it would not have effected a total cure. *Hawkes v. Coles* (1910) 3 B. W. C. C. (Eng.) 163.

The refusal to submit to a slight operation, although unreasonable, will not preclude an award of compensation to the workman for the loss of his finger, where it is not clear that the operation would have saved it. *Marshall v. Orient Steam Nav. Co.* [1910] 1 K. B. (Eng.) 79, 79 L. J. K. B. N. S. 204, [1909] W. N. 225, 101 L. T. N. S. 584, 26 Times L. R. 70, 54 Sol. Jo. 50 3 B. W. C. C. 15.

In *Braithwaite v. Cox* (1911) 5 B. W. C. C. (Eng.) 77, *Cozens-Hardy, M. R.*, said that it was not reasonable to require a workman to submit to an operation to remove a dead eye merely because there was danger from possible suppuration from it affecting the other eye.

<sup>29</sup> The refusal of an injured workman to undergo an operation which his own medical adviser, an eminent surgeon, had advised him not to submit to, is not a bar to compensation. *Sweeney v. Pumpherson Oil Co.* (1903) 5 Sc. Sess. Cas. 5th series, 972, 40 Scot. L. R. 721, 11 Scot. L. T. 279.

In *Tutton v. The Majestic* [1909] 2 K. B. (Eng.) 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 482, 53 Sol. Jo. 447, it was held that a workman who, in good faith and upon the advice of his own doctor, refuses to have an operation per-

of each case.<sup>30</sup> A workman cannot be claimed to be unreasonable in refusing to undergo an operation, where there is no evidence that the operation could lessen the amount of compensation payable by the employers.<sup>31</sup>

As to the effect of the refusal of a workman to be examined by a doctor, see notes 61 et seq. *infra*.

Earning capacity is a question of fact,<sup>32</sup> and the finding of the arbitrator

formed, cannot be said to be acting unreasonably.

A workman may be found not to have acted unreasonably in failing to exercise his hand where his own doctor was of the opinion that the exercise would not benefit it. *Moss v. Akers* (1911) 4 B. W. C. C. (Eng.) 294.

<sup>30</sup> Whether or not a workman is unreasonable in refusing to have an operation performed is a question of fact, with which the appellate court will not interfere, where the doctors are not wholly agreed as to the advisability of the operation. *Ruabon Coal Co. v. Thomas* (1909) 3 B. W. C. C. (Eng.) 32.

The county court judge is not justified in holding that a workman was unreasonable in not going to work where a part of his little finger had been amputated and slight adhesions were made, and the employer maintained that by using the hand the adhesions would break down, but the workman, three days before the application to review was heard, had undergone a second amputation upon the advice of a doctor. *Burgess v. Jewell* (1911) 4 B. W. C. C. (Eng.) 145.

A workman cannot be held to have unreasonably refused to have an operation performed, where there was no proof that the operation alleged had been refused, although the workman had refused to take an anesthetic for another operation and an anesthetic was necessary for the performance of the operation alleged. *Hays Wharf v. Brown* (1909) 3 B. W. C. C. (Eng.) 84.

That the second application of an anesthetic, which proved fatal, would not have been necessary if the workman had permitted his hand to be amputated, instead of having skin grafted onto it, which would have preserved the hand, does not preclude the widow from compensation, where the operations were performed by a skillful surgeon. *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. (Eng.) 51, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430, 2 B. W. C. C. 342.

Whether or not a workman is unreasonable in refusing to undergo an operation is a question of fact, and the findings of the arbitrator will not be disturbed if there is any evidence to support them. *Dolan & Son v. Ward* (1915) 8 B. W. C. C. (Eng.) 514.

<sup>31</sup> *Molamphy v. Sheridan* [1914] W. C. & Ins. Rep. 20, 47 Ir. L. T. 250, 7 B. W. C. C. 957.

<sup>32</sup> *Arnott v. Fife Coal Co.* [1912] S. C. 1262, 49 Scot. L. R. 902, 6 B. W. C. C. 281.

<sup>33</sup> *Warwick S. S. Co. v. Callaghan* (1912) L.R.A.1916A.

will not be reviewed if there is evidence to sustain it.<sup>33</sup> But if the finding of the county court judge as to the cause of incapacity is not in accord with the evidence, the case must be remitted.<sup>34</sup>

No general rule as to the amount of compensation can be laid down, but the judge must use his discretion with regard to the particular facts of each case.<sup>35</sup> Under the Saskatchewan compensation act, it has been held that an

5 B. W. C. C. (Eng.) 283; *Roberts v. Benham* (1910) 3 B. W. C. C. (Eng.) 430; *Creighton v. Lowry* [1915] W. C. & Ins. Rep. (Eng.) 69, 8 B. W. C. C. 250; *Curry v. Duxford* [1915] W. C. & Ins. Rep. (Eng.) 81, 8 B. W. C. C. 19; *Wells v. Cardiff Steam Coal Collieries* (1909) 3 B. W. C. C. (Eng.) 104; *Dolan & Son v. Ward* (1915) 8 B. W. C. C. (Eng.) 514; *Harrison v. Ford* (1915) 8 B. W. C. C. (Eng.) 429; *Penman v. Smith's Dry Docks Co.* (1915) 8 B. W. C. C. (Eng.) 487; *Barron v. Blair & Co.* (1915) 8 B. W. C. C. (Eng.) 501.

The finding of the county court judge that the applicant's incapacity was a result of an old hernia will not be disturbed, although there was some evidence that the workman had strained himself somewhat in the employment. *Legge v. Nixon's Nav. Co.* [1914] W. C. & Ins. Rep. (Eng.) 7 B. W. C. C. 521.

The finding of the county court judge that the incapacity of a workman was due to bad medical treatment at a hospital, and not to the injury, will be sustained where there is some evidence to sustain it. *Rocca v. Jones* [1914] W. C. & Ins. Rep. (Eng.) 34, 7 B. W. C. C. 101.

The finding of the arbitrator that the incapacity resulting from an accident had ceased will not be disturbed, although it was admitted that his age and a natural tendency to obesity, greatly accelerated by the enforced idleness due to his injury, had rendered him less and less fit for labor of any kind. *Taylor v. Clark*, [1914] S. C. (H. L.) 104, [1914] 2 Scot. L. T. 125, 51 Scot. L. R. 740, 58 Sol. Jo. 738, 7 B. W. C. C. 871, [1914] W. N. 327, [1914] W. C. & Ins. Rep. 448, 111 L. T. N. S. 882, 84 L. J. P. C. N. S. 14, reversing the court of sessions [1914] S. C. 432, 1 Scot. L. T. 336, 51 Scot. L. R. 418, 7 B. W. C. C. 856.

<sup>34</sup> *Taylor v. Bolckow* (1911) 5 B. W. C. C. (Eng.) 130.

The county court judge is not justified in saying that incapacity continued where the undisputed medical evidence was that the workman had entirely recovered. *Binns v. Kearley* (1913) 6 B. W. C. C. (Eng.) 608. In this case the applicant contended that the county court judge had seen the injured finger and he was the sole judge of the facts. Furthermore it appeared that the applicant had been treated in a hospital two or three days after the doctors had said he had completely recovered.

<sup>35</sup> *Webster v. Sharp* [1904] 1 K. B. (Eng.) 218, 73 L. J. K. B. N. S. 141, 68 J. P. 140, 52 Week. Rep. 275, 89 L. T. N. S. 627, 20 Times L. R. 121, affirmed in [1905] A. C.



injured employee is entitled, first, to his expenses, medical services, and hospital bills; second, for pain and suffering caused by the injury and diminution of his capacity for the enjoyment of life; third, for his inability to earn an income equal to that which he has earned in the past; and that the measure of damages under the third is the difference between what he might have earned and was likely to have earned if he had not been injured, and what he might earn and was likely to earn in his injured state.<sup>36</sup>

The workman has no absolute title to

an award of 50 per cent of his wages; that is merely the maximum amount which can be awarded;<sup>37</sup> nor, on the other hand, is the amount of compensation in case of partial disability limited to one half of the difference between what the workman was earning before the injury, and what he was able to earn afterwards.<sup>38</sup> The clause which provides that, in fixing the amount of a weekly payment, regard is to be had to the difference between the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, does not

284, 74 L. J. K. B. N. S. 776, 92 L. T. N. S. 373.

The court will not interfere with the finding of the arbitrator as to the quantum of the compensation. *Roberts v. Hall* (1912) 106 L. T. N. S. (Eng.) 769, 5 B. W. C. C. 331; *Slater v. Blyth Ship Bldg. & Dry Docks Co.* [1914] W. C. & Ins. Rep. (Eng.) 39, 7 B. W. C. C. 193. In the latter case the applicant was for a time confined in an insane asylum for reasons independent of the injury, and the county court judge, upon finding that when he went to the asylum he was fit for light work, except for the insanity, made an award accordingly.

Upon an application to reduce the payment, a county court judge is entitled to find that a teamster was earning more than 10s. a week, where he took a farm of his own of 45 acres at a rent of £95, possessed, among other things, eight bullocks and two horses, employed his father, to whom he paid 13s. a week and gave board and lodging free, and also employed a lad to whom he paid 8s. a week, and he himself with his wife had free board and lodging at a clergyman's house. *Duberley v. Mace* (1913) W. C. & Ins. Rep. (Eng.) 199, 6 B. W. C. C. 82.

Under the Saskatchewan act, it is error to award as compensation a sum larger than the earning for three years as estimated from the evidence offered. *Uhlenburgh v. Prince Albert Lumber Co.* (1913; Sask.) 7 B. W. C. C. 1028.

The county court judge is not justified in finding that the average earnings of a workman were 45s. a week, where he had worked on an average four and a half days a week and the pay was but 6s. per day. *James v. Mordey* (1913) 109 L. T. N. S. (Eng.) 377, 6 B. W. C. C. 680.

<sup>36</sup> In *Kier v. Benell* (1914) 7 Sask. L. R. 78, the court said: "The principle upon which damages are to be estimated in cases under this act are the same as in an ordinary action for damages for personal injury. If the damages sustained estimated in accordance with the above stated principle are fixed at \$1,800 or any less amount, § 15 of the act has no application. If the damages sustained exceed the amount of \$1,800, it will then be necessary to take into consideration 'estimated earnings' during the three years, but only in order to L.R.A.1916A.

determine what amount up to \$2,000 can be allowed, but in no case can more than \$2,000 be awarded."

<sup>37</sup> *Fox v. Battersea* (1911) 4 B. W. C. C. (Eng.) 261; *Snell v. Bristol Corp.* [1914] 2 K. B. (Eng.) 291, 83 L. J. K. B. N. S. 353, 110 L. T. N. S. 563, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 103, 7 B. W. C. C. 236.

But subsec. 2 of article 7322, of the Quebec act, does not limit the rent which can be recovered to the annual rent procurable with a capital sum of \$2,000, except in those cases provided for in article 7329, where, after the amount of the compensation has been agreed upon, or after judgment ordering it to be paid, the employer is required, at the option of the person injured or his representative, to pay the capital of the rent to an insurance company designated for that purpose by order in council. *Canadian P. R. Co. v. McDonald* (1915) 31 Times L. R. (Eng.) 600. It was contended by the employer that the compensation to the workman who had been partially but permanently injured should not exceed the annual rent procurable with the capital sum of \$2,000. But the court held that he was entitled to one half the amount by which his earning capacity had been reduced by the injury.

<sup>38</sup> *Jones v. London & N. W. R. Co.* (1901) 4 W. C. C. (Eng.) 140.

This decision must be considered as overruling *Russell v. Holme* (1900; C. C.) 2 W. C. C. (Eng.) 153, 108 L. T. Jo. 373, in which the county court judge held that the intention of the legislature was that the employee should bear only half the loss, and that he could award him as compensation only one half the difference between the wages earned before and those earned after the accident.

In *Humphreys v. London Electric Lighting Co.* (1911) 4 B. W. C. C. (Eng.) 275, an award by the county court judge of one half the difference between what the workman was earning after and what he had earned before the accident was sustained. The county court judge held that the amount awarded was a reasonable amount under all the circumstances of the case. *Cozens-Hardy, M. R.*, said: "The judge has treated himself as not bound by any absolute rule

operate so as necessarily to cut down the maximum rate of compensation allowed by paragraph 1 (b) of the schedule;<sup>39</sup> the arbitrator may, if upon the evidence he sees fit, give as compensation the whole amount of the difference between the average earnings of the workman before the injury and the average amount of his earnings after the injury, provided that it does not exceed 50 per cent. of the average earnings before the injury, and does not exceed £1 a week.<sup>40</sup> So an allowance for partial incapacity need not be less than the allowance for total incapacity.<sup>41</sup>

Even if a workman who has been receiving full compensation recovers somewhat, and is able to earn something, the employer is not, as a matter of course,

of law, and I do not think that he was wrong in exercising his discretion in the way he did."

In *Russell v. Holme* (Eng.) *supra*, the view was taken that where a workman was partially incapacitated and capable of earning but a portion of his former wages, the loss should be borne equally by the employer and the workman.

<sup>39</sup> *Illingworth v. Walmsley* [1900] 2 Q. B. (Eng.) 142, 82 L. T. N. S. 647, 69 L. J. Q. B. N. S. 519, 16 Times L. R. 281.

<sup>40</sup> *Parker v. Dixon* (1902) 4 Sc. Sess. Cas. 5th series, 1147, 39 Scot. L. R. 663, 10 Scot. L. T. 153; *Corbet v. Glasgow Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series, 782, 40 Scot. L. R. 601, 11 Scot. L. T. 60; *Geary v. Dickson*, 4 F. (Scot.) 1143, as cited in 2 Mews' Dig. Supp. 1571.

An arbiter may decline to diminish a payment where the average weekly wage was 36s. and 8d., and the weekly payment was 18s. and 4d., and the workman was earning but 17s. per week after his injury. *Bryson v. Dunn* (1905) 8 Sc. Sess. Cas. 5th series (Scot.) 226.

<sup>41</sup> The county court judge may award full compensation although he finds the workman only partially incapacitated. *Osborne v. Tralee & D. R. Co.* [1913] 2 I. R. 133, 47 Ir. Law Times, 141, [1913] W. C. & Ins. Rep. 391, 6 B. W. C. C. 913.

<sup>42</sup> Where a workman was so injured that he received one half the amount of his average weekly earnings, the fact that he recovers in part, so as to be earning something, will not of itself require that the payment of compensation be reduced. *Ellis v. Knott* (1900) 2 W. C. C. (Eng.) 116.

<sup>43</sup> *Moore v. Pryde* [1913] W. C. & Ins. Rep. 100, 50 Scot. L. R. 302, [1913] S. C. 457, [1913] Scot. L. T. 49, 6 B. W. C. C. 384.

<sup>44</sup> *Rankine v. Fife Coal Co.* (1915) 52 Scot. L. R. 361, 8 B. W. C. C. 401.

<sup>45</sup> In *Irons v. Davis* [1899] 2 Q. B. (Eng.) 330, 68 L. J. Q. B. N. S. 673, 80 L. T. N. S. 673, 47 Week. Rep. 616, a workman lost the top joint of his left thumb, and was consequently incapacitated for work L.R.A.1916A.

entitled to have the compensation reduced;<sup>42</sup> a *prima facie* case is presented justifying a reduction of the compensation, but it is open to the workman to prove circumstances which will warrant the arbitrator in refusing to diminish the compensation.<sup>43</sup>

A workman does not bar himself from recovering compensation by reason of the fact that he had acquiesced for nearly two years in suspension of the payments by the employer made under an unregistered agreement.<sup>44</sup>

It has been held that there is no justification for making an award of compensation where the workman is earning the same wages after the injury as before.<sup>45</sup> In this point of view it follows that "if there is a practical admission

for a certain period. Subsequently he was taken back again into the service of the same master at the same rate of wages as before the accident, but upon a different kind of work. The county court judge awarded him compensation for the period during which he was incapacitated for work, and also half a crown a week for life. Upon appeal it was held that there was no evidence justifying the award of half a crown a week for life.

In *Pomphrey v. Southwark Press* [1901] 1 K. B. (Eng.) 86, 83 L. T. N. S. 468, 70 L. J. Q. B. N. S. 48, 65 J. P. 148, 17 Times L. R. 53, an apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, and the indenture of apprenticeship was canceled. He obtained, in proceedings under the act, an award of a weekly payment based on his wages for the previous year. He afterwards resumed work at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. The county court judge dismissed the application by the employers for the review and termination of the weekly payment, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand. On appeal it was held that, on a review of a weekly payment made by award under the act, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that in the absence of evidence of advantages incidental to the employment, and capable of being appraised at a money value, the earnings before the accident must be determined by the wages received; that the county court judge was therefore wrong in refusing to review the weekly payment; but that the weekly payment should be continued at a nominal



on the part of the workman that the incapacity has ceased, then he cannot claim compensation in respect of incapacity." <sup>46</sup> But on the other hand, if an actual diminution of his wage-earning capacity is established, the fact that, at the date of his claim, he was earning the same wages as he had earned before the accident does not, of itself, show that he is not entitled to compensation. The arbitrator may consider the probabilities that, if the injuries had not been sustained, the man might be making more money. <sup>47</sup> Nor is his right to compensation necessarily forfeited because he refused to accept an offer of his employer to give him work at wages equal to his former earnings. <sup>48</sup> Under the express provisions of the act of 1906, schedule 2, ¶ 16, the arbitrator, in the case of an injured minor, is to take into consideration the "sum which the workman would

probably have been earning" had he not been injured. <sup>49</sup>

The county court judge, under the act of 1906, in considering what the workman was earning before the accident, and what he was able to earn afterward, is required to have regard to extraneous circumstances, such as a universal reduction in wages. <sup>50</sup>

There is a sharp conflict between the English and Scotch courts as to whether profits in a business undertaken by the workman after his injury are to be considered in estimating what he "is earning or is able to earn in some suitable employment or business after the accident." The Scotch court of session has held that profits made in business undertaken by the workman after his injury are not the measure of the workman's earning capacity; <sup>51</sup> while the English court of appeal has held that the expres-

sion of the word "earn" in the act means the amount, in order to preserve the right of the applicant to make any further application that might become necessary.

In *Baird v. McWhinnie* [1908] S. C. 440, 45 Scot. L. R. 338, 1 B. W. C. C. 109, it was held that a charge against the employers would be suspended where the workman, who had returned to work, refused the tender by the employers of the difference between what he earned after he returned and what he had earned for a like period before his injury.

A workman is not entitled to payment for a time during which he was earning full wages. *Beath v. Ness* (1903) 6 Sc. Sess. Cas. 5th series, 168, 41 Scot. L. R. 113, 11 Scot. L. T. 455.

Under the Quebec act a workman is not entitled to compensation where after the accident he voluntarily returned to the employer with the same salary he received before the accident. *Cater v. Grand Trunk R. Co.* (1912) 18 Rev. de Jur. (Can.) 27, cited in *Canadian Dig.* 1912, col. 825.

<sup>46</sup> *Nimms v. Fisher* [1906-07] S. C. (Scot.) 890. In this case the servant had returned to work, and earned at first wages lower than those received before the injury, and afterwards somewhat more than those wages.

<sup>47</sup> *Freeland v. Macfarlane* (1900) 2 Sc. Sess. Cas. 5th series, 832, 37 Scot. L. R. 599, 7 Scot. L. T. 456.

In estimating compensation of a servant for the loss of a thumb, the circumstance that his chances of employment in competition with others are lessened may properly be taken into account. *Roylance v. Canadian P. R. Co.* (1908) 14 B. C. 20.

<sup>48</sup> *Fraser v. Great North of Scotland R. Co.* (1901) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

In *Jackson v. Hunslet Engine Co.* (1915) 84 L. J. K. B. N. S. (Eng.) 1361, it was held that the county court judge misdirected himself where he considered that the fact that the applicant was physically able to L.R.A.1916A.

do the work he was doing before, and that the employer offered him such work, was conclusive to show that he had suffered no loss of wage-earning capacity.

<sup>49</sup> The fact that a minor who has been injured returns to work at the same compensation does not per se entitle the employer to have the compensation ended. *Malcolm v. Bowhill Coal Co.* [1910] S. C. 447, 47 Scot. L. R. 449, 3 B. W. C. C. 562.

<sup>50</sup> *Bevan v. Energlyn Colliery Co.* [1912] 1 K. B. (Eng.) 63, [1911] W. N. 206, 105 L. T. N. S. 654, 28 Times L. R. 27, 81 L. J. K. B. N. S. 172, 5 B. W. C. C. 169. In this case the eight-hour law had gone into effect after the accident, and its effect was to reduce the wages which the workman had been earning before the accident by nearly one third. The court pointed out that the words of clause 3 of schedule 1, "such relation to the amount of that difference as under the circumstances of the case may appear proper," did not appear in the act of 1897, and consequently the decision in *James v. Ocean Coal Co.* [1904] 2 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483, did not apply to the present case. In the *James Case* it was held that the amount originally fixed as the compensation was not subject to variation by reason of a fall in wages in the workman's line of work.

In *Black v. Merry* [1909] S. C. 1150, 46 Scot. L. R. 812, and in *Jamieson v. Fife Coal Co.* (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 958 (decided under the act of 1897) it was held that a workman is not entitled to compensation in respect to the diminution of his earnings after he returns to work, which is due to a general fall in wages, and not to any supervening incapacity.

<sup>51</sup> *Paterson v. Moore* [1910] S. C. 29, 47 Scot. L. R. 30, 3 B. W. C. C. 541. The Lord President said: "It seems to me that the man's wage-earning capacity is a per-

sion, "the average amount which he may be able to earn after the accident," is not limited to earnings under an employer, but includes earnings in a private business.<sup>52</sup>

The county court judge had no jurisdiction to make an award on the sliding schedule,<sup>53</sup> or to make a prospective award to terminate at a future date; he can deal only with the present condition of the workman.<sup>54</sup>

As a general rule, a workman is not

entitled to full compensation if he can procure light work which he is able to do,<sup>55</sup> and it is his duty to use diligent efforts to procure such work.<sup>56</sup> It has sometimes happened that a workman, although capable of doing light work, was unable to obtain it, and the cases are not entirely harmonious as to the effects of this situation. It has been held that the employer cannot be compelled to furnish light work for the workman permanently,<sup>57</sup> and that he is not bound to

perfectly different thing from the question of what profit he makes in a business, and the learned sheriff, upon the statement of the case, has considered nothing else. He has taken the business which this man ran. He has taken the net drawings, then he has deducted the expenses; he has allowed for interest upon capital at a fixed sum, and has deducted wages which he paid to other persons, and then the remainder he has taken as the wage-earning capacity. That seems to me a perfectly different thing. The amount remaining may be his wage-earning capacity, or it may not. But you cannot get at the man's wage-earning capacity by finding out what he is making in business."

<sup>52</sup> Norman v. Walder [1904] 2 K. B. (Eng.) 27, 73 L. J. K. B. N. S. 461, 68 J. P. 401, 52 Week. Rep. 402, 90 L. T. N. S. 531, 20 Times L. R. 427, 6 W. C. C. 124. Collins, M. R., said: "The legislature's intention was to compensate an injured workman for his loss,—that is to say, his loss of earning power,—and therefore, I think, the average amount which the workman is able to earn after the accident ought not to be limited in its meaning so as to exclude everything except what he receives by way of wages from an employer. The highest weekly payment that the act allows to be awarded as compensation is half the average weekly earnings earned before the accident, which shows that compensation under the act was not intended to be a complete compensation. If a review of the weekly payment is desired under § 12, the whole situation must be looked at. The arbitrator should find out how far the workman's money-earning capacity has been altered; and if it is as good as it was before the accident, the fact should not be ignored, even though the money made by the workman is not received by him as wages paid him by an employer."

<sup>53</sup> Newhouse v. Johnson (1911) 5 B. W. C. C. (Eng.) 137 (award was so many shillings per week or two thirds of the difference between £1 and workman's weekly earning, whichever should be less); Walton v. South Kirby, F. & H. Colliery (1912) 107 L. T. N. S. (Eng.) 337, 5 B. W. C. C. 640 (award was £1 per week until a day certain, 10s. a week for four months thereafter, and then a penny a week).

<sup>54</sup> Baker v. Jewell [1910] 2 K. B. (Eng.) 673, 79 L. J. K. B. N. S. 1092, 103 L. T. L.R.A.1916A.

N. S. 173, 3 B. W. C. C. 503; Allen v. Thomas Spowart & Co. (1906) 43 Scot. L. R. 599; Evans v. Barrow Hematite Steel Co. (1914) 7 B. W. C. C. (Eng.) 681.

<sup>55</sup> McNamara v. Burt (1911) 4 B. W. C. C. (Eng.) 151.

An award in favor of the employer will be sustained where the evidence showed that the workman was able to do light work and many of his pains were imaginary. Price v. Burnyeat (1907) 2 B. W. C. C. (Eng.) 337.

The order of the county court judge reducing the compensation payable to a minor workman who had been injured, based upon the ground that the minor had refused to do light work offered him, will be discharged where, because of a change in his solicitors, the minor had been unable to offer evidence as to his condition. Thornber v. Durkin [1914] W. C. & Ins. Rep. (Eng.) 341, 7 B. W. C. C. 548.

<sup>56</sup> A county court judge is entitled to reduce the compensation being paid to an injured workman, where he finds that the workman was able to do light work, but had made no effort to find any, and claimed apparently that it was the duty of the employers to furnish him with light work which he could do. Williams v. Ruabon Coal & Coke Co. [1914] W. C. & Ins. Rep. (Eng.) 32, 7 B. W. C. C. 202.

A county court judge may reduce payment where evidence is given that the workman is able to do light work, although it is not shown that he had been offered any by the employer or could get any, but it did not appear that he had sought any. Anglo-Australian Steam Nav. Co. v. Richards (1911) 4 B. W. C. C. (Eng.) 247.

The county court judge is justified in reducing the compensation of a workman who had lost an arm, from 11s. per week to 7s. 6d., where it appeared that the workman, apart from the loss of his arm, was otherwise physically fit, was young and in good health during the five years which had elapsed since his injury, had made no attempt to secure light work otherwise than to make a formal application to his former employers for such work, which they were unable to give him. Silcock v. Golightly [1915] 1 K. B. (Eng.) 748, 84 L. J. K. B. N. S. 499, 112 L. T. N. S. 800, 50 L. J. 55, [1914] W. C. & Ins. Rep. 164, [1915] W. N. 33, 8 B. W. C. C. 48.

<sup>57</sup> The employer cannot guarantee perpetual employment in view of the fluctuation



furnish light work when he has not got it;<sup>58</sup> nor can the employer guarantee the workman against the fluctuations of the labor market.<sup>59</sup> The court of appeal has declared that the employer, upon proving that the workman is able "to do any kind of light work," is entitled to have the compensation reduced, and there is no obligation resting upon the employer to show that he can get such work to do.<sup>60</sup> But it had been previously held by the same court that where the county court judge has found that the workman was capable of doing "some light work if he could obtain it," there was a burden upon the employer to show that there was work of that character ob-

tainable.<sup>61</sup> And in another earlier case, full compensation was restored where the workman, who had injured his hand, had partially recovered and had been earning wages somewhat less than he had formerly earned, but had been discharged and was unable to secure other light work, although, as was expressly found by the county court judge, he was fully capable of doing light work which did not require the full use of his hand.<sup>62</sup> The conflict in these decisions of the court of appeal is shown by the extract quoted below from a Scotch decision.<sup>63</sup> The House of Lords has laid down the principle that "incapacity for work" also means incapacity to get work be-

of the labor market. *Gray v. Reed* [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43.

<sup>58</sup> *Dobby v. Pease* (1909) 2 B. W. C. C. (Eng.) 370.

<sup>59</sup> *Gray v. Reed* [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43; *Cardiff Corp. v. Hall* [1911] 1 K. B. (Eng.) 1009, 80 L. J. K. B. N. S. 644, 104 L. T. N. S. 467, 27 Times L. R. 339, 4 B. W. C. C. 159; *Clark v. Gaslight & Coke Co.* (1905) 21 Times L. R. (Eng.) 184.

<sup>60</sup> *Cardiff Corp. v. Hall* [1911] 1 K. B. (Eng.) 1009, 80 L. J. K. B. N. S. 644, 104 L. T. N. S. 467, 27 Times L. R. 339, 4 B. W. C. C. 159.

To the same effect, *Guest v. Winsper* (1911) 4 B. W. C. C. (Eng.) 289.

In the Cardiff Case, Bulkley, L. J., said: "To express the same thing more briefly, inability to earn for the purposes of sched. I. ¶ 3, is inability to get employment owing to some incapacity for work personal to the workman, to the exclusion of inability to get employment owing to the state of the labor market. The employer may be called an insurer of 'capacity for work,' but he is not an insurer of a 'right to work.'"

In *Carlin v. Stephen* [1911] S. C. 901, 48 Scot. L. R. 862, it was shown that the workman was able to do light work and that the employers had offered him such work. Lord Salvesen was of the opinion that the compensation might have been reduced on the first finding alone.

<sup>61</sup> It is difficult to reconcile the decision in the Cardiff Case with that in *Proctor v. Robinson* [1911] 1 K. B. (Eng.) 1004, 80 L. J. K. B. N. S. 641, 3 B. W. C. C. 41, where it was held that in the absence of any evidence that the workman is able to procure light work, such as he is able to do, no reduction of compensation will be made. Fletcher Moulton, L. J., who was a member of both courts rendering the decisions, attempts to distinguish them upon the ground that in the Proctor Case the finding was that he could do "some" light work if he could find it. But Cozens-Hardy, M. R., dissented in the Cardiff Case, L.R.A.1916A.

and reiterated his views as expressed in the Proctor Case: "Either they (the employers) should first obtain some work which the workman could do, and offer it to him, and give evidence of this, or else they should give evidence that there is some chance of the workman obtaining a particular kind of light work in the district. Here the employers failed to prove the case they put forward. The burden was upon them, and they have failed to discharge it."

<sup>62</sup> The decision in *Clark v. Gaslight & Coke Co.* (1905) 21 Times L. R. 184, under the earlier act, was to the effect that where the workman's injury left him physically fit for a narrow circle of occupations only, and he is unable to find work in any of them, he is entitled to compensation as being wholly incapacitated. But Fletcher-Moulton, L. J., said that there was nothing in this decision which conflicted with his conclusions in the Cardiff Case.

<sup>63</sup> In *Carlin v. Stephen* [1911] S. C. 901, 48 Scot. L. R. 862, 5 B. W. C. C. 486, Lord Salvesen said: "It is not easy to reconcile this decision with that in Proctor's Case, for, as the master of the rolls pointed out, not only had the employers failed to adduce any evidence that light work could be obtained by the workman, but the workman had given affirmative evidence that his reasonable and repeated efforts to obtain such work had been unsuccessful. The judges, however, who formed the majority, found themselves able to distinguish and explain the previous decision to which one of them—Fletcher Moulton, L. J.—had been a party, and thought that there was abundant evidence justifying a review of the former award. There, as here, there was no evidence whatever tendered by the employer that the workman was able to earn a specific weekly wage, and therefore the Cardiff Case may be taken as affirming the right of the arbitrator to diminish the compensation without making a finding in fact to that effect. In an elaborate judgment in which he reviews the previous cases, Fletcher Moulton, L. J., negated the principle of law for which the workman contended: 'That where partial incapacity has been caused by an acci-

cause of the injured condition of the workman.<sup>64</sup> And again it has been held by the same House that a workman who, although capable of doing light work, is prevented because of the injuries from obtaining it, is entitled to have the award based upon his ability to do light work reviewed.<sup>65</sup> It is apparently impossible to derive any general principle from these cases, especially as the House apparently approves the reasoning of the of the court of appeal in the Cadiff Case.

In one case the court rejected the rather curious contention on the part of the counsel for the employer, that a workman who had been injured and was unable to procure light work should have worked without pay if in that way he could have recovered his earning capacity in part, at least, and that he could easily have procured work under these conditions.<sup>66</sup>

It has been held that the county court judge may diminish compensation without evidence as to the exact amount the workman can earn at light labor.<sup>67</sup> Up-

on the question of the amount of wages a workman is able to earn at light labor, the arbitrator is entitled to act upon his own knowledge of the labor market and the condition of the trade.<sup>68</sup> But if the workman offers to prove that he had tried, and was in fact not able, to procure light work, the arbitrator must consider the evidence and act upon it, although he may consider it along with his own local knowledge of the conditions of the labor market.<sup>69</sup>

dent the employers are bound to show not only that the workman is capable of doing other work, but that he is able to obtain it, and that otherwise he is entitled to an award as for total incapacity.' The judgment is not binding on us, but has the weight which attaches to the considered opinions of two such eminent judges as Fletcher Moulton and Buckley, L. J. I have no difficulty in agreeing with the result to which they arrived. My only doubt is as to whether the court of appeal had not gone too far in the earlier cases."

<sup>64</sup> Ball v. Hunt [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459. Lord Atkinson said: "The words 'incapacity for work' may mean physical inability to do work so as to earn wages, or it may mean inability to earn wages by reason of inability to get employment due to the belief of employers in the unfitness of the workman to perform work owing to the injury they perceive he has sustained."

<sup>65</sup> Macdonald v. Wilsons & C. Coal Co. [1912] A. C. (Eng.) 513, [1912] S. C. (H. L.) 74, 81 L. J. P. C. N. S. 188, 106 L. T. N. S. 905, 28 Times L. R. 431, 56 Sol. Jo. 550, [1912] W. N. 145, [1912] W. C. Rep. 302, 5 B. W. C. C. 478, 49 Scot. L. R. 708. In this case the injured workman had been employed for a time by the employers but was discharged and was unable to find work with other employees because of his condition. Earl Loreburn said: "Ought we to say that if a man, though physically fit for some work, is prevented by the consequences of the injury from obtaining it,—in other words is disabled from earning wages,—that nevertheless he is 'able to earn' wages, and is not under any in-

capacity for work? He is under an incapacity if his condition makes his labor unsalable or salable only at a less wage."

Boag v. Lochwood Collieries [1910] S. C. 51, 47 Scot. L. R. 47, 3 B. W. C. C. 549, was disapproved.

<sup>66</sup> Upon the liquidation of the employers, an indemnity company in which the employers were insured cannot contest liability to pay compensation on the ground that the workman was able to do light work, and by doing it would have removed the incapacity, where there was evidence that the man was unable to procure any light work. Bonsall v. Midland Colliery Owners Mut. Indemnity Co. [1914] W. C. & Ins. Rep. (Eng.) 331, 7 B. W. C. C. 613.

<sup>67</sup> Roberts v. Hall (1912) 106 L. T. N. S. (Eng.) 769, [1912] W. C. Rep. 269, 5 B. W. C. C. 331; Carlin v. Stephen [1911] S. C. 901, 48 Scot. L. R. 862, 5 B. W. C. C. 486.

<sup>68</sup> Roberts v. Hall (1912) 106 L. T. N. S. (Eng.) 769, 5 B. W. C. C. 331.

<sup>69</sup> Dyer v. Wilsons' & C. Coal Co. (1914) 52 Scot. L. R. 114, 8 B. W. C. C. 367.

<sup>70</sup> In Rex v. Templer, (1911; Div. Ct.) 132 L. T. Jo. (Eng.) 203, it was held that the county court judge had jurisdiction to entertain an application to review weekly payments being made under an award by a committee representing the employees and workmen, which award presumed that the workmen could perform light labor which was furnished by the employer, but which, as a matter of fact, the applicant found himself unable to perform.

<sup>71</sup> Thayne v. Gray [1915] W. C. & Ins. Rep. (Eng.) 64, 8 B. W. C. C. 17.

<sup>72</sup> Cowan v. Simpson (1909) 3 B. W. C. C. (Eng.) 4.



an application to diminish weekly payments where the county court judge found that the man was fit for light work, and where the evidence was undisputed that the employers had offered him light work, the county court judge is not entitled to make an order refusing to diminish the payment without requiring evidence from the workman as to his condition and as to his probable earnings.<sup>73</sup>

What is a suitable occupation for a workman who has not fully recovered is primarily a question of fact depending upon his condition and the nature of the work in question.<sup>74</sup> The county court judge may find that mining coal is not a "suitable occupation" for a man, one of whose eyes is defective.<sup>75</sup> So the work of stoking a furnace may be found unsuited for a workman who has lost one eye by accident, where the other eye is also affected.<sup>76</sup> But a miner who had lost an eye while at work at his employment cannot claim upon his recovery that the same employment is not suitable for him, merely because of the fact that if a similar accident befalls him in the future, the consequence will be the total loss of his eyesight.<sup>77</sup> An

arbitrator, however, is not bound by this decision to find that work as a miner at the coal face is suitable for a miner who had recently lost an eye at such work.<sup>78</sup>

Whether or not the refusal of a workman to do light work is unreasonable is a question of fact.<sup>79</sup> But the arbitrator is not justified in holding that light work is not suitable for a workman who had lost an eye, merely upon the workman's opinion that the fumes from a gas plant would probably cause an irritation to his remaining eye.<sup>80</sup> A workman may be found to be acting unreasonably in refusing to do light work, although the refusal is based upon the advice of his doctor.<sup>81</sup> The county court judge may find that the workman's refusal to perform light labor is unreasonable, although the employer has not specifically alleged this fact in his answer.<sup>82</sup>

In fixing the amount of the weekly payment, regard must be had to any payment, allowance, or benefit which the workman may have received from the employer during the period of his incapacity.<sup>83</sup> The fees paid by the employer for treatment given to the injured employee at a hospital may be deducted from the compensation paid to the work-

<sup>73</sup> Gray v. Reed [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43.

<sup>74</sup> The county court judge is justified in failing to reduce the compensation given to an injured employee, where he found that the man could do the old work, but that it would be dangerous for him and that it was not suitable employment because of his injury. Dinnington Main Coal Co. v. Bruins [1912] W. C. Rep. (Eng.) 173, 5 B. W. C. C. 367.

<sup>75</sup> Eyre v. Houghton Main Colliery Co. [1910] 1 K. B. (Eng.) 695, 79 L. J. K. B. N. S. 698, 102 L. T. N. S. 385, 26 Times L. R. 302, 54 Sol. Jo. 304, 3 B. W. C. C. 250.

<sup>76</sup> Thompson v. Newton (1914) 7 B. W. C. C. (Eng.) 703.

<sup>77</sup> Law v. Baird [1914] S. C. 423, 51 Scot. L. R. 388, [1914] W. C. & Ins. Rep. 140, 7 B. W. C. C. 846.

To the same general effect was the decision in Housley v. Hadfields (1915) 8 B. W. C. C. (Eng.) 497, where it was held that a steel settler could not refuse to do his old work merely because he was afraid that he might lose the sight of his other eye, with the result that he would be totally blind.

<sup>78</sup> Burt v. Fife Coal Co. (1914) 52 Scot. L. R. 51, 8 B. W. C. C. 350.

<sup>79</sup> Furness v. Bennett (1910) 3 B. W. C. C. (Eng.) 195.

An offer by the employers to give a workman injured at Belfast, work in Dublin at his old wage, may be found to be reasonable, the employers having discontinued L.R.A.1916A.

their business in Belfast. Wallis v. McNeice (1912) 46 Ir. L. T. 202, 6 B. W. C. C. 445.

<sup>80</sup> Ashmore v. Lillie [1915] W. C. & Ins. Rep. (Eng.) 7, 8 B. W. C. C. 89.

<sup>81</sup> Higgs v. Unicum [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. N. S. 369, 108 L. T. N. S. 169, [1913] W. N. 36, [1913] W. C. & Ins. Rep. 263, 6 B. W. C. C. 205. See also Cowan v. Simpson (1909) 3 B. W. C. C. (Eng.) 4, cited supra, note 72.

In both of these cases it was contended that, inasmuch as the workman followed the advice of his doctor, he could not be considered to have acted unreasonably, citing Tutton v. The Majestic [1909] 2 K. B. (Eng.) 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 482, 53 Sol. Jo. 447, 2 B. W. C. C. 346, in which case it was held that a workman did not act unreasonably in refusing to have an operation performed where his doctor advised against it. But in the Higgs Case, Hamilton, L. J., distinguished between a case in which the workman neither had nor could be expected to have any competent knowledge, and a case in which the circumstances were peculiarly within the knowledge of the workman, as his ability to do light work.

<sup>82</sup> Potts v. Guildford (1914) 7 B. W. C. C. (Eng.) 675.

<sup>83</sup> An employer who, for a considerable portion of time after an accident, had paid the workman considerably more than half wages as compensation, and then reduced the payment to half wages, but in computing the half wages did not take into consideration certain allowances which were

men.<sup>84</sup> But no regard shall be had of any payments made to the workman which the employer was legally bound to make.<sup>85</sup>

*e. "Average weekly earnings" (§ 2).*

*1. In general.*

In the case of a fatal accident to a workman who has for the three years preceding the accident been in the employment of the same employers, the compensation is based on the total of his earnings during those three years. But in cases where there is a fatal accident after a period of employment amounting to less than three years, and in cases where total or partial incapacity results from the injury, the "average weekly earnings" of the workman constitute the basis of computation for the assessment of the amount recoverable.<sup>86</sup>

The phrase "average weekly earnings" is to be taken in the natural meaning of the term,<sup>87</sup> and has been defined as the total amount actually earned by the workman during his employment divided by the number of weeks during which or during part of which he was employed.<sup>88</sup> In the absence of any agreed rate of

wages, an agreement for the usual rate for that particular work in that locality will be inferred.<sup>89</sup>

In the case of minors, it is necessary to read into schedule 1, ¶ 3, the "probable earnings" of a minor in place of his "average earnings."<sup>90</sup> In computing the average weekly earnings of a casual laborer hired by the hour, it is not competent to take into account the probability of his continuing in the employment.<sup>91</sup>

The average earnings of a workman constitute a question of fact; and if there is evidence to support the county court judge's conclusion, it will not be interfered with.<sup>92</sup>

Under the act of 1897, the only proper basis for the assessment of the amount of compensation with reference to the average weekly earnings of the workman was to consider the period of actual employment under his own employer, and the sum actually received by him from that employer. An arbitrator was not entitled to take into consideration what the workman might possibly have earned in the employment of other employers.<sup>93</sup> But this frequently worked

paid to the workman, is entitled, upon a subsequent application for arbitration, to have the excess paid under the first arrangement offset against the arrears due the workman under the second arrangement. *Porter v. Whitbread* [1914] W. C. & Ins. Rep. (Eng.) 59, 7 B. W. C. C. 205. *Cozens-Hardy, M. R.*, said: "In the case of an ordinary workman, I think you are bound to take into consideration all these payments. The opposite view would strike me as almost so absurd as not to be permissible at all. Any payments in respect of the accident must be taken into account."

An amount paid the workman under an unregistered agreement, which amount was tendered and received as full settlement of the employer's liability to the workman, must be taken into account where the registrar refused to register the agreement and the county court to whom the matter was referred awarded compensation. *Horsman v. Glasgow Nav. Co.* (1909) 3 B. W. C. C. (Eng.) 27.

<sup>84</sup> *Suleman v. The Ben Lomond* (1909; C. C.) 126 L. T. Jo. (Eng.) 308, 2 B. W. C. C. 499.

Maintenance and medical treatment received by an injured seaman in a hospital, which was subsequently paid for by the employer, may be found to be a benefit received by the seaman during the period of incapacity. *Sorensen v. Gaff* [1912] S. C. 1163, 49 Scot. L. R. 896, 6 B. W. C. C. 279.

<sup>85</sup> *In McDermott v. The Tintoretto* [1911] A. C. (Eng.) 35, 80 L. J. K. B. N. S. 161, 103 L. T. N. S. 769, 27 Times L. R. 149, L.R.A.1916A.

55 Sol. Jo. 124, 11 Asp. Mar. L. Cas. 515, 4 B. W. C. C. 123, 48 Scot. L. R. 728, it was held that the provisions of paragraph 3 of the first schedule do not require that, in fixing the compensation of a seaman who was totally incapacitated by accidental injury, regard must be had to the payment of any wages and maintenance which the vessel was required to give him under the merchants' shipping acts, where the applicant did not ask for compensation for the period prior to his return to England.

<sup>86</sup> *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351.

<sup>87</sup> (Eng.) *Ibid.*

<sup>88</sup> *Fleming v. Lochgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Scot. L. R. 684, 10 Scot. L. T. 114.

<sup>89</sup> *Jones v. Walker* (1899; C. C.) 105 L. T. Jo. (Eng.) 579, 1 W. C. C. 142.

<sup>90</sup> *Edwards v. Alyn Steel Tinplate Co.* (1910) 3 B. W. C. C. (Eng.) 141.

<sup>91</sup> *Case v. Colonial Wharves* (1905) 53 Week. Rep. (Eng.) 514.

<sup>92</sup> *Williams v. Wynnstay Collieries* (1910) 3 B. W. C. C. (Eng.) 473.

<sup>93</sup> *Price v. Marsden* [1899] 1 Q. B. (Eng.) 493, 68 L. J. Q. B. N. S. 307, 47 Week. Rep. 274, 80 L. T. N. S. 15, 15 Times L. R. 184; *Williams v. Poulson* (1899) 16 Times L. R. (Eng.) 42, 63 J. P. 757, 2 W. C. C. 126; *Small v. McCormick* (1899) 1 Sc. Sess. Cas. 5th series, 883, 36 Scot. L. R. 700, 7 Scot. L. T. 35.

Where a workman who had been employed by contractors in a mine was dis-



hardships, upon the workman, and by the express provisions of schedule 1, paragraph 2 (a), of the act of 1906, the court is empowered in cases where the shortness of the time during which the workman has been in the employment of his employers, or the casual nature of his employment, or the terms of the employment render it impracticable to compute the rate of remuneration at the date of the accident, to resort for assistance in estimating that rate, to matters relating to workmen of the same grade employed at the same work for the same employer, or even should this fail, to persons in the same grade employed in the same class of employment in the same district.<sup>94</sup> Paragraph 2 (b)

missed, and two days thereafter secured employment from the mine master in the same mine, and after working three days was injured, his earnings under the contractors cannot be considered in fixing his compensation. *Hunter v. Baird*, 7 F. (Scot.) 304 (Ct. of Sess.) as cited in 2 News' Dig. Supp. 1570.

In *Bartlett v. Tutton* [1902] 1 K. B. (Eng.) 72, 71 L. J. K. B. N. S. 52, 66 J. P. 196, 50 Week. Rep. 149, 85 L. T. N. S. 531, 18 Times L. R. 35, a workman employed as a casual dock laborer to work for a day met with an accident in the course of his employment. He was paid 3s. 3d. for the work done by him up to the time of the accident, being at the rate of so much an hour for the number of hours he had worked. There was no evidence that the workman had ever before, or would again, work for the employers. An award in the workman's favor for 50 per cent of 18s.,—which the judge found to be the average weekly earnings of an ordinary casual dock laborer in the port of Bristol (where the workman worked), taking one week with another throughout the year,—was held to be erroneous, as there were materials before the arbitrator upon which it was possible for him to find the weekly earnings of the workman in the employment of the defendant.

<sup>94</sup> *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351.

<sup>95</sup> *Barnett v. Port of London Authority* [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252, [1913] W. C. & Ins. Rep. 250, [1913] W. N. 35, 57 Sol. Jo. 282, 6 B. W. C. C. 105.

<sup>96</sup> *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351. In this case the workman was a casual dock laborer who worked first for one stevedore and then for another, "just as a job turned up," remaining idle between jobs, and had worked but two days for the respondent when injured. The L.R.A.1916A.

of the first schedule also expressly provides for the consideration of wages earned under concurrent contracts of service, so that the arbitrator may now in a proper case, consider earnings received from another employer than that from whom compensation is sought.

## 2. Grades.

The word "grade," as used in schedule 1 (1) (a), has no technical meaning.<sup>95</sup> It does not refer to the individual characteristics of the workman, but to the particular rank in the industrial hierarchy occupied by the workman, such as shepherd, carter, bricklayer, etc.<sup>96</sup> But, in determining the question of average weekly earnings of a casual workman,

county court judge found that it was impracticable to compute the rate of compensation, and that among dock laborers there were no definite grades; but that the men formed themselves into "good" and "bad," and that the applicant belonged to the latter grade because of his poor physique and his addiction to drink. In sending the case back to the county court judge, Cozens-Hardy, M. R., observed: "I think the learned county court judge has misdirected himself as to the meaning of the word 'grade.' That word does not involve or depend upon individual characteristics. Each grade may, and indeed must, have good and bad members. The good and the bad are not two grades. I think the case must go back to the learned county court judge to decide whether casual dock laborers from a distinct grade in the hierarchy of labor, and, if so, what are the average earnings in that grade. He may have regard to these average earnings, but he will not be bound to take those average earnings as the basis of his award. He has seen Perry, and is satisfied that he was not getting, and would not get, the full average. But Perry must not be put into an artificial class of bad workers entitled to only half wages. If, however, the county court judge should decide that casual dock laborers do not form a distinct grade, it will then be necessary to estimate the proper compensation as best he can without the aid afforded by the proviso in § 2(a)." Fletcher Moulton, L. J., said: "In considering the average earnings of a workman of the same grade he was not entitled to consider whether the workman in question was a good or a bad specimen. By the word 'grade' the act refers, in my opinion, to a class of employment, and not to the relative merits or capabilities of the persons in that class, so that it is an error to talk about a class of good workmen and a class of bad workmen as constituting different grades. The relevant grade in this case was that of casual dock laborers as a whole; and the learned judge was entitled to have regard to the average account earned by such laborers in the district, but was not entitled to separate

after fixing the grade to which he belongs, regard must then be had to the personal qualifications of the man.<sup>97</sup>

Where the arrangements are such that casual dock laborers are divided into two classes, one of which is entitled to employment in preference to the other, the two classes form distinct grades.<sup>98</sup> "Light work" furnished to an injured workman is not a grade of employment,<sup>99</sup> and there is no grade of strike breakers.<sup>1</sup>

Any step from one grade up or down to another is a change of employment for

them into two grades, namely, the good and bad workmen, and consider only the average amount earned by those whom he included in the latter class."

In *Cain v. Frederick Leyland & Co.* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 368, a casual shipwright was injured on the first day of his employment. The county court judge found that there were two classes of casual shipwrights,—the good and the indifferent; and fixed the mean between the average earned by the two classes as being the average weekly earnings of the average good shipwright, such as he found the injured workman to be, and his conclusion was sustained by the court of appeal. It is to be noted that the county court judge did not make use of the word "grade," and Fletcher Moulton, L. J., said that there was nothing in his findings that could be excepted to, as a matter of law.

<sup>97</sup> *Cue v. Port of London Authority* [1914] 3 K. B. (Eng.) 892, 83 L. J. K. B. N. S. 1445, 111 L. T. N. S. 736, [1914] W. N. 280, 137 L. T. Jo. 211, 7 B. W. C. C. 447.

In *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 1 B. W. C. C. 351, Cozens-Hardy, M. R., said: "Having found that the man has a particular grade and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man or is above or below an average man. This must be so where men in a particular grade are employed on piecework. You cannot reject evidence of the skill and efficiency of the individual workman. Where payment is at so much per hour for every man in a particular grade, the skill and efficiency may, perhaps, be disregarded, though I am not prepared to say that the age and the habits of the individual may not have such an influence upon his chance of employment as to deserve consideration."

In computing the average weekly earnings of a casual laborer, the arbitrator is not merely to ascertain the amount of the average weekly earnings of men employed in the same class of work as the applicant, but regard must be had to the personal qualifications of the injured workman; and L.R.A.1916A.

the purpose of estimating the average weekly earnings of the workman "at the time of the injury."<sup>2</sup> A different rule prevailed under the act before it was amended in 1906 by the addition of the second paragraph of schedule 1.<sup>3</sup>

In fixing the compensation of an injured workman who had served the same employer in different capacities, the compensation must be based on the wages the workman was earning in the grade of employment in which he met with the accident.<sup>4</sup> But if the workman is

if his actual earnings during the past year or any other evidence showed that he was in fact above the average, that must be regarded. *Snell v. Bristol Corp.* [1914] 2 K. B. (Eng.) 291, 83 L. J. K. B. N. S. 353, 110 L. T. N. S. 563, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 103, 7 B. W. C. C. 236.

<sup>98</sup> Where dock laborers were divided into three classes known as A laborers and B laborers and extra casual laborers, and the A laborers had permanent employment, and the B laborers secured admission tickets and got employment after the A laborers, and the extra casual laborers had a chance for work after the B laborers, and at the same rate of pay, the B laborers and the extra casual laborers, form or may form separate grades. *Barnett v. Port of London Authority* [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252, [1913] W. C. & Ins. Rep. 250, [1913] W. N. 35, 57 Sol. Jo. 282, 6 B. W. C. C. 105.

<sup>99</sup> Where a workman previously injured had returned and been employed at "light work" for upwards of six months, the earnings for that period only are to be considered in determining his average weekly earnings, and the question of the existence of other workmen "of the same grade" does not arise. *Gough v. Crawshaw Bros.* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 238, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 374.

<sup>1</sup> *Priestley v. Port of London Authority* [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252, 57 Sol. Jo. 282, 6 B. W. C. C. 105.

<sup>2</sup> *Perry v. Wright* (Eng.) supra.

<sup>3</sup> *Price v. Marsden* [1899] 1 Q. B. (Eng.) 493, 80 L. T. N. S. 15, 68 L. J. Q. B. N. S. 307, 47 Week. Rep. 274, 15 Times L. R. 184, holding that the amount of compensation due to a workman who had been employed by the same employer during twelve months before the accident should be computed from the weekly earnings during the entire twelve months, although the character of his work had, within that period, been altered, and his wages increased.

<sup>4</sup> *Babcock v. Young* [1911] S. C. 406, 48 Scot. L. R. 298, 4 B. W. C. C. 367 (workman served as boiler maker and as common laborer).

Where a mill girl in a roperie, because of her proficiency in her work, was advanced



regularly employed in one grade, and is temporarily transferred to another grade in an emergency, the wages of the latter grade do not determine his compensation.<sup>5</sup>

The construction and meaning of the word "grade" as used in schedule 1 (2) is a question of law.<sup>6</sup>

### 3. Concurrent employments.

The provision in ¶ 2 (b), as to concurrent contracts, applies only to cases where it is necessary to compute the average weekly earnings of the workman; consequently earnings under a concurrent contract are to be disregarded where compensation is sought by the dependents of a workman who had worked continuously for over three years for the same employer.<sup>7</sup>

This provision does not apply where,

to a machine where a finer grade of hemp was handled, and her wages were increased, such a change is a change in the grade of her employment; and although she had worked in that grade but five weeks at the time of her injury, her compensation is to be fixed with reference to the wages she was earning at the time of her injury, and not with reference to the average amount she had earned during the year. *Dalgleish v. Edinburgh Roperie & Sailcloth Co.* [1913] S. C. 1007, 50 *Scot. L. R.* 916, 6 B. W. C. C. 867.

<sup>5</sup> Where a sailor had for some time been employed in different capacities and at various rates of wages by the employer, and at the time of his accident had been engaged three days temporarily as mate in the place of his son, who had been injured, it is error for the county court judge to hold that the man's grade at the time of his death was that of mate, and that the determination of the grade was a question of law which was appealable. *Jury v. The Atlanta* [1912] 3 K. B. (Eng.) 366, 81 L. J. K. B. N. S. 1182, 107 L. T. N. S. 366, 28 *Times L. R.* 562, 56 *Sol. Jo.* 703, [1912] W. N. 218, 5 B. W. C. C. 681.

Where a workman who was employed as a casual carter, for a few weeks immediately prior to his death had been employed by the same employers as a casual teamster while the employers were on the lookout for a regular man, the dependents were not entitled to compensation upon the basis of his wages as teamster, which were higher than those earned as cartman, but the total amount of wages earned by the cartman, both as carter and as teamster, were to be taken into consideration in calculating the "average weekly earnings." *Edge v. Gorton* [1912] 3 K. B. (Eng.) 360, 81 L. J. K. B. N. S. 1185, 107 L. T. N. S. 340, 28 *Times L. R.* 566, 56 *Sol. Jo.* 719, [1912] W. N. 217, 5 B. W. C. C. 614.

The same method of calculating the average weekly earnings was approved in *Dobson v. British Oil & Cake Mills* (1912) L.R.A.1916A.

although money is earned in another way, it is not earned under contract of employment.<sup>8</sup> And a laborer has not concurrent contracts of employment, where he only takes the second job on which the contract arises after the first one is finished, and he only takes a later one after the second one is finished.<sup>9</sup> The concurrent contracts, however, need not be of an ejusdem generis character.<sup>10</sup>

### 4. Absences from work.

In computing the average weekly earnings of a workman who had been in the employment for a full year or more, but who was unable to work all of the time because the employer did not have work for him, his total earnings for the year are to be divided by 52, and not by that figure, less the number of weeks he did not work for this reason.<sup>11</sup> The same

106 L. T. N. S. (Eng.) 922, [1912] W. C. Rep. 207, 5 B. W. C. C. 405.

<sup>6</sup> *Jury v. The Atlanta* (Eng.) supra.

<sup>7</sup> *Buckley v. London & I. Docks* (1909) 127 L. T. Jo. (Eng.) 521, 2 B. W. C. C. 327.

<sup>8</sup> An employee of a laundry who also gives music lessons is not entitled when injured in the laundry to claim anything for the money earned by giving music lessons which was not earned under a contract of employment. *Simmons v. Heath Laundry Co.* [1910] 1 K. B. (Eng.) 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 *Times L. R.* 326, 54 *Sol. Jo.* 392, 3 B. W. C. C. 200.

<sup>9</sup> The county court judge is in error in finding that a porter on a wharf, engaged by different shipping companies from time to time, was under concurrent contracts of employment. *Cue v. Port of London Authority* [1914] 3 K. B. (Eng.) 892, [1914] W. N. 280, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1445, 111 L. T. N. S. 736, 7 B. W. C. C. 447.

<sup>10</sup> The amount earned in the evening at a theater by a workman employed during the day by a railroad company is to be taken into consideration in fixing his average weekly earning, although the rules of the railroad provided that all persons employed by the company must devote themselves exclusively to the company's service. *Lloyd v. Midland R. Co.* [1914] 2 K. B. (Eng.) 53, 83 L. J. K. B. N. S. 330, 110 L. T. N. S. 513, 30 *Times L. R.* 247, 58 *Sol. Jo.* 249, [1914] W. N. 32, [1914] W. C. & Ins. Rep. 108, 7 B. W. C. C. 72.

In fixing the average weekly earnings of a stoker, a retainer as stoker in the Royal Naval Reserve must be taken into account, as well as his wages. *The Raphael v. Brandy* [1911] A. C. (Eng.) 413, 80 L. J. K. B. N. S. 1067, 105 L. T. N. S. 116, 27 *Times L. R.* 497, 55 *Sol. Jo.* 579, 4 B. W. C. C. 307.

<sup>11</sup> In calculating the average weekly earnings consideration must be given to the

method is to be employed in case of regularly recurring holidays.<sup>12</sup> Where, however, a workman voluntarily takes time off, the weeks so taken off are to be subtracted from the total number of weeks in the year, before dividing the total amount earned for the purpose of ascertaining the average weekly earnings. In such a case the divisor is not 52, or

the number of weeks in the year, but the number weeks he could have worked.<sup>13</sup> A different conclusion was apparently reached by the court of appeal in the case arising under the act of 1897.<sup>14</sup>

A more complex problem arises where the workman has not been employed for a full year, and during a portion of the

period which the workman had not worked because the employers had not worked enough to employ him. *White v. Wiseman* [1912] 3 K. B. (Eng.) 352, 81 L. J. K. B. N. S. 1195, 107 L. T. N. S. 277, 28 Times L. R. 542, 56 Sol. Jo. 703, [1912] W. N. 216, 5 B. W. C. C. 654, Ann. Cas. 1913D, 1021.

The proper method of computing the average weekly earnings of a workman who has not worked all the weeks of the year, partly because there was no work and partly because he voluntarily took some time off, is to divide the whole amount earned by the number of weeks actually worked, divide the result by 52, and multiply the quotient by the number of weeks which he might have worked. *Anslow v. Cannock Chase Colliery Co.* [1909] 1 K. B. (Eng.) 352, 78 L. J. K. B. N. S. 154, 99 L. T. N. S. 901, 25 Times L. R. 167, 53 Sol. Jo. 132, 2 B. W. C. C. 361, affirmed in [1909] A. C. 435, 78 L. J. K. B. N. S. 679, 100 L. T. N. S. 786, 25 Times L. R. 570, 53 Sol. Jo. 519, 2 B. W. C. C. 365.

To the same effect is a Scotch ruling to the effect that, in computing the "average weekly earnings" of a laborer who had been employed for a varying number of hours on seventy-seven stated days at irregular intervals, during a period of 105 weeks, the total amount of the earnings should be divided by the whole number of weeks, without discarding weeks in which there had been no employment. *Small v. McCormick* (1899) 1 Sc. Sess. Cas. 5th series, 883, 36 Scot. L. R. 700, 7 Scot. L. T. 35.

In computing the average weekly earnings of a workman who had been employed for over a year in the same trade by the employer, a period of time during which trade was slack and the workman was absent from his work, due to the fluctuations of the trade, is not to be excluded, although such slackness was due somewhat to the conditions of war, but arose independently of the war. *Griffiths v. Gilbertson* [1915] W. N. (Eng.) 253, 84 L. J. K. B. N. S. 1312. *Warrington, L. J.*, said that fluctuation of trade, even if caused by the war, are necessarily incident to the trade, and are not abnormal conditions within the meaning of schedule 1, clause 2(c).

<sup>12</sup> In *Bailey v. Kenworthy* [1908] 1 K. B. (Eng.) 441, *Cozens-Hardy, M. R.*, laid down the following rule: Where a workman is employed by the piece, and there have been stoppages of work during the year, owing to a break in the canal, accidents to machinery, bank holidays and trade holidays, it is error to divide the amount earned during the year by 52 in L.R.A.1916A.

order to arrive at the average weekly earnings, but that the amount received should be divided by the actual number of weeks or portions of weeks during which the work was done, as it was not the workman's fault that the stoppages occurred. But *Fletcher Moulton, L. J.*, held that stoppages on recognized holidays were to be regarded as times when the employer could not be called upon to furnish employment, and the amount which the workman might have earned during such period was to be deducted. He said: "I will assume, for the sake of clearness, that the total of the stoppages from recognized holidays amount to two weeks, and that the remainder of the interruptions from accidents and other causes amount to one week. It appears to me that the right method of proceeding is to say that the sum total of the earnings, namely, £83 2s. 1d., was earned by forty-nine weeks' work, and the average per week thus obtained will give the average wages earned in a week of full work. But there are only fifty weeks of full work in the year, and therefore the average earnings in a week would be less than the figure so obtained by one twenty-sixth part, or about 4 per cent. In other words, the earnings in a week of full work are to that extent higher than the average weekly earnings in the employment, because there is incident to it an enforced idleness of two weeks in the year. The week during which the workman was absent from work on account of breakdown in the works stands in a different position."

It is apparent that the amount arrived at by *Cozens-Hardy, M. R.*, would exceed that arrived at by *Fletcher Moulton, L. J.* *Farwell, L. J.*, did not deliver judgment. The question is left open so far as this case is concerned, since the parties subsequently agreed upon the amount and further proceedings in the court were not had. However, in the subsequent case of *Anslow v. Cannock Chase Colliery Co.* [1909] 1 K. B. (Eng.) 352, 78 L. J. K. B. N. S. 154, 99 L. T. N. S. 901, 25 Times L. R. 167, 53 Sol. Jo. 132, 2 B. W. C. C. 361, *Cozens-Hardy, M. R.*, spoke with approval of the judgment delivered by *Fletcher Moulton, L. J.*, and said that there was no difference of opinion.

<sup>13</sup> *Ibid.* (Eng.); *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351.

<sup>14</sup> *Keast v. Barrow Haematite Steel Co.* (1899) 15 Times L. R. (Eng.) 141, 63 J. P. 56, 1 W. C. C. 99.



period of employment the workman, for some reason, did not work. In a Scotch case where the workman had been employed for thirteen weeks, but had been absent for a fortnight because of illness, and for nearly another fortnight because of general trade holidays, the court of session held that the arbitrator was wrong in dividing the total amount earned by thirteen;<sup>15</sup> such a holding would amount to an assumption that out of every thirteen weeks the workman would always be ill for two weeks and there would always be two weeks of trade holidays. The case is not very satisfactory because the court apparently took the view that the question was one of fact for the arbitrator; at least, the question of law was not answered, but remit was made to the arbitrator to proceed. The following principles may, however, be fairly drawn from the language of the Lord President: Ordinarily the average weekly earnings of a workman are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and if there are regularly recurring trade holidays when no work can be done, by deducting from the result above obtained a fraction equal to the fraction of the year during which, for this reason, no wages can be earned. Nothing is said as to how the absences

from illness were to be treated, but it seems plain from the language of schedule 1, ¶ 2 (c), that nothing should be deducted because of such time.

In an early case before the county court judge, it was held that where a holiday occurred during the two weeks in which the employee worked, the average weekly earnings were only one half of what he actually earned.<sup>16</sup>

There is dicta in an opinion of one of the judges of the English court of appeal that the average weekly earnings of a workman are not affected by the question whether or not a larger or smaller amount of enforced stoppages due to trade holidays occurs in the period which furnishes the material for the average.<sup>17</sup>

Absence from work because of some unavoidable cause, such as is referred to in ¶ 2 (c), must be ejusdem generis with illness;<sup>18</sup> that is, it must be a cause personal to the workman, and not have to do with the work, such as absences due to trade holidays.<sup>19</sup>

Absences of a few days in an employment lasting for one and one-half years may be disregarded in the case of a workman working by the hour.<sup>20</sup> Absence of a workman from work because of a strike, not in his own trade, but in an allied trade, is an "unavoidable cause," and is to be deducted from the time when the workman could have worked.<sup>21</sup> Absences due to unavoidable causes are

<sup>15</sup> *Carter v. Lang* [1908] S. C. 1198, 45 Scot. L. R. 938, 1 B. W. C. C. 379.

<sup>16</sup> Where the workman had been employed for two full weeks, one-half the amount he earned during those weeks is his average weekly earnings, although one of the weeks embraced Christmas day, upon which he earned nothing, so that his average weekly earnings for the two weeks were less than his earnings for one of those weeks. *Fairecloth v. Waring & Gillow* (1906; C. C.) 8 W. C. C. (Eng.) 99.

<sup>17</sup> In *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 1 B. W. C. C. 351, *Fletcher Moulton, L. J.*, said: "For instance, two workmen in the same employment, at the same wages would, in my opinion, be entitled to have their average weekly earnings estimated at the same figure, even though the Wakes Week occurred in the period during which the one had been in the master's employment, and did not so occur in the case of the other. The master would be entitled to have regard taken to the fact that the average weekly earnings in such employ were somewhat less than the £2 by reason of the fact that only fifty weeks were worked out of the fifty-two of which a year consists; but the rate of remuneration so arrived at must be applied equally to the case of each of the two workmen." L.R.A.1916A.

<sup>18</sup> (Eng.) *Ibid.*

<sup>19</sup> *Carter v. Lang* (Scot.) *supra*.

<sup>20</sup> The court of appeal will dismiss an appeal from an award of the county court judge, who, in estimating the compensation to be paid to the dependent of a workman who has been paid by the hour, took the odd days at the beginning and at the end of the employment as full two weeks, and made no reduction for two periods of four days during which the workman was absent because of illness; the court said that they could not estimate the amount which he would have earned during the two periods in which he was absent because of illness, and that the error in taking the odd days as two full weeks was too trivial to be the subject of an appeal. *Turner v. Port of London Authority* [1913] W. C. & Ins. Rep. (Eng.) 123, 29 Times L. R. 204, 6 B. W. C. C. 23.

<sup>21</sup> In computing the average weekly earnings of a workman who had been employed by an employer for upwards of one year at the same trade, a week during which the workman was absent from his work due to a strike, not in his own trade, but another trade with which his trade was related, should be excluded. *Griffiths v. Gilbertson* [1915] W. N. (Eng.) 253, 84 L. J. K. B. N. S. 1312.

not to be regarded where the employment has been continuous with the same employer for three years, and the compensation is sought by his dependents.<sup>22</sup>

**5. Period of employment forming basis for computation of average weekly earnings.**

In case of the death of the workman, the compensation recoverable by the dependents is based upon the earnings for the previous three-year period; but in case of injury not resulting in death, the workman's compensation is based upon his wages for the period of one year preceding the accident.<sup>23</sup> Where a workman has been employed continuously by the same employer for upwards of three years, neither the provision relative to the concurrent employments nor the one relative to absences due to illness is applicable, but the compensation is limited to the amount of wages actually received by the employee.<sup>24</sup> And in the case of an injured workman, only the last twelve months of the employment can be taken into consideration, although the conditions as to earnings had considerably changed during that period.<sup>25</sup>

A workman need not be in the employment for two weeks in order to recover compensation. The English court of appeal had laid down the rule that in order to obtain the benefit of the act a workman must have been, for at least two weeks, in the employment of the employ-

er in whose service he has sustained the injury for which he seeks compensation.<sup>26</sup> But the decisions cited were reversed by the House of Lords,<sup>27</sup> and the correct doctrine was declared to be that the right to compensation given by § 1 of the act is not restricted by schedule I. to employments by the week, or for weekly wages, or for two weeks at least, and that employment by the day for one or more days is within the act. It was remarked that the word "average" in the expression "average weekly earnings" is used loosely and inaccurately in the schedule, and that the words in section 1 "in accordance with the first schedule to this act" are not intended to limit or restrict the right of the workman to receive compensation, or the obligation upon the employer to pay it, but denote the manner and mode in which the payment is to be carried into effect. The effect of this decision is that the right to compensation does not depend on the length of service, but merely on the fact that the workman was injured while in the employment of the "undertaker" through an accident arising out of the employment.<sup>28</sup> Compensation is recoverable although the workman had not been in the employment long enough to be entitled to any wages.<sup>29</sup>

There is a conflict between the English and Scotch courts with regard to the effect of the decision of the House of Lords upon the rights of a servant who is

<sup>22</sup> Where a workman had been in the employment of the same employer for upwards of three years, and had been in the same grade of employment during that time, his dependents are entitled to compensation to the amount of his wages for three years preceding the accident resulting in his death, where that sum is between £150 and £300, and absence due to the illness of the workman is to be disregarded. *Greenwood v. Hall* [1915] W. N. (Eng.) 1244, 31 Times L. R. 476, 59 Sol. Jo. 577.

<sup>23</sup> *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351.

<sup>24</sup> *Buckley v. London & I. Docks* (1909) 127 L. T. Jo. (Eng.) 521, 2 B. W. C. C. 327; *Greenwood v. Hall* [1915] W. N. (Eng.) 244, 31 Times L. R. 476, 59 Sol. Jo. 577.

<sup>25</sup> Where the workman had been employed by the same employer for many years, but during the last twelve months previous to the accident he had, owing to slackness of work, been employed much less than the full number of hours per week, the compensation was awarded on the basis of the average weekly earnings for the last twelve months only. *Kelly v. York Street Flax Spinning Co.* (1909; C. C.) 43 Ir. L. T. Jo. 81, 2 B. W. C. C. 493.

L.R.A.1916A.

<sup>26</sup> *Lysons v. Knowles* [1900] 1 Q. B. (Eng.) 780, 69 L. J. Q. B. N. S. 449, 64 J. P. 292, 48 Week. Rep. 408, 82 L. T. N. S. 189, 16 Times L. R. 250; *Stuart v. Nixon* [1900] 2 Q. B. (Eng.) 95, 82 L. T. N. S. 489, 69 L. J. Q. B. N. S. 598, 48 Week. Rep. 598, 16 Times L. R. 335.

<sup>27</sup> [1901] A. C. (Eng.) 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156.

<sup>28</sup> There is a sufficient basis for computing the "average weekly earnings," where a servant worked on the Friday in one week, and then during the following week until Thursday, when the accident occurred. *Cadzow Coal Co. v. Gaffney* (1900) 3 Sc. Sess. Cas. 5th series, 72, 38 Scot. L. R. 40, 8 Scot. L. T. 224.

And where the servant was injured on the fifth day of his second week of work. *Russell v. McCluskey* (1900) 2 Sc. Sess. Cas. 5th series, 1312, 37 Scot. L. R. 931, 8 Scot. L. T. 172.

<sup>29</sup> *Leonard v. Baird* (1901) 3 Sc. Sess. Cas. 5th series, 890, 38 Scot. L. R. 649, 9 Scot. L. T. 83, holding that in a case where a servant was killed so soon after the employment that no right to any wages had accrued at the time of his death, a dependant was entitled to recover £150.



working under a weekly contract. The court of appeal has taken the position that where such a servant had worked less than two weeks before the accident, the average earnings are to be arrived at by taking the actual facts, and deducting therefrom a hypothetical sum which represents what the workman would have earned if he had had the opportunity of performing his duties during two complete weeks. The actual sum earned in a given fraction of a week is not treated as the week's earnings.<sup>30</sup>

In Scotland, on the other hand, it has been held that the proper construction of the decision of the House of Lords is that the actual earnings for a part of a week, if the period of work has been no longer, are to be taken as the earnings with reference to which the compensation is to be assessed.<sup>31</sup> Where death ultimately resulted from injuries received during the workman's first week of employment, but he had continued to work during a second week, it was held that the earnings of the second week might be taken into account in calculating the amount recoverable.<sup>32</sup> But where a workman, after working one week, is injured so soon after the beginning of the following week that no right to any wages had then accrued, the sum earned

in the first week represents his average weekly earnings.<sup>33</sup>

In cases of casual and intermittent employment, the average weekly earnings are arrived at by taking the total amount earned, and dividing that sum by the number of weeks during which the employment lasted.<sup>34</sup>

#### 6. Trade or calendar weeks.

In an English case, where a servant worked for six consecutive days, beginning on Wednesday and ending on the following Tuesday, the work being done under a daily engagement, no notice on either side being necessary to terminate the connection, but where it was also shown that there was a custom in the trade to pay weekly wages, it was held that compensation was properly awarded on the footing that the sum earned during the six days represented his average weekly earnings. The court considered that it was immaterial, for the purposes of the computation, that the trade week of the employer ended on the Thursday night, and negatived the contention of the employer that, for this reason, the average weekly earnings were half of the amount actually received.<sup>35</sup> In another case, it is said that the number of weeks constituting the divisor of

<sup>30</sup> *Ayres v. Buckenridge* [1902] 1 K. B. (Eng.) 57, 71 L. J. K. B. N. S. 28, 65 J. P. 804, 50 Week. Rep. 115, 85 L. T. N. S. 472, 18 Times L. R. 20.

This decision apparently overrules *Peers v. Astley & T. Collieries Co.* (1901; C. C.) 3 W. C. C. (Eng.) 185, in which it was held that where a workman had worked for less than a week, the amount actually earned is to be taken as the average weekly earnings.

Where a workman had worked part of a week only, his compensation is to be fixed with regard to what he would have earned had he worked for the entire week. *Greaves v. Mulliners* (1901; C. C.) 3 W. C. C. (Eng.) 189.

Where a meat porter secured work at the dock as a strike breaker, being taken on as an extra casual laborer, and was employed for twelve continuous days before his accident, and there was every probability that, but for his accident, he would have been continuously employed until the end of the strike, which lasted for five weeks after the accident, the county court judge is justified in taking the amount he earned for the first completed week as his average weekly earning. *Barnett v. Port of London Authority* [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252 [1913] W. C. & Ins. Rep. 250 [1913] W. N. 35, 57 Sol. Jo. 282, 6 B. W. C. C. 105.

<sup>31</sup> *McCue v. Barclay* (1902) 4 Sc. Sess. L.R.A.1916A.

*Cas.* 5th series, 909, 39 Scot. L. R. 690, 10 Scot. L. T. 116; *Grewar v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 895, 39 Scot. L. R. 687, 10 Scot. L. T. 111.

<sup>32</sup> *Doyle v. Beattie* (1900) 2 Sc. Sess. Cas. 5th series, 1166, 37 Scot. L. R. 915, 8 Scot. L. T. 131.

<sup>33</sup> *Nelson v. Kerr* (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Scot. L. R. 645, 9 Scot. L. T. 83.

In *Brown v. Cunningham* (1904) 6 Sc. Sess. Cas. 5th series (Scot.) 997, it was held that where a workman was engaged for a fixed weekly wage, entered upon his work on a Saturday, and worked for the whole of the following calendar week, at the end of which his employment was terminated by his employers in consequence of an injury resulting in total incapacity, he was entitled to compensation, and that the fixed weekly wage was the basis for determining the amount of the weekly payment. The Lord Justice Clerk said: "I am satisfied that where there is a fixed contract, and it is fulfilled over a full week, the earnings so made by contract form the true basis for ascertaining the rights as to compensation. This is, I think, consistent with the view expressed in the House of Lords in the case of *Lysons*." See note 26, *supra*.

<sup>34</sup> *Williams v. Poulson* (1899) 16 Times L. R. (Eng.) 42, 63 J. P. 757.

<sup>35</sup> *Watters v. Clover* (1901) 18 Times L. R. (Eng.) 60.

the total earnings is not the number of weeks from the pay day, but the number of weeks from the first day of employment.<sup>36</sup> But another view prevails in Scotland, where it has been held that the week to be taken as the unit of division is not the calendar week, but the trade or pay week of the particular employment.<sup>37</sup> If there is no trade week, the calendar week from Sunday to Saturday is to be taken as the week with reference to which the average earnings are to be estimated.<sup>38</sup>

### 7. Continuity of the employment.

The words "period of his actual employment under the said employer," as used in paragraph 1 (a) (i), are construed as denoting the period of continuous employment immediately preceding the accident; and that period alone

is to be taken into account in computing the amount of compensation recoverable.<sup>39</sup> Any separate and distinct periods during which the servant may previously have worked are not to be taken into consideration.<sup>40</sup> But a temporary cessation of work does not necessarily break the continuity of the employment in such a manner as to exclude from the computation the period anterior to that cessation.<sup>41</sup> Continuous employment may be found to exist where, for a period of upwards of ten months, the applicant worked for the employer during a portion of each week, except for four weeks, when he did not work, for some reasons not appearing.<sup>42</sup>

To enable a court to say that "a series of short periods [of work] should be taken together and treated as a continuous term, there must be some nexus to

<sup>36</sup> *Turner v. Port of London Authority* (1913) 29 Times L. R. (Eng.) 204, 6 B. W. C. C. 23.

<sup>37</sup> *Fleming v. Lochgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Scot. L. R. 684, 10 Scot. L. T. 114. The facts were that the claimant had been employed for three days in one week, and during the whole of the next two weeks, and on the Sunday of the fourth week. It was held that, in estimating his average weekly earnings, the total amount of his earnings must be divided by the number of calendar weeks, i. e., four, over which his employment extended. The court explained that the special point thus ruled upon had not been raised in an earlier case, in which the system of computation followed was the same as in the English case just cited. *Peacock v. Niddrie & B. Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 443, 39 Scot. L. R. 317, 9 Scot. L. T. 379.

In *Campbell v. Fife Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 170, 40 Scot. L. R. 143, 10 Scot. L. T. 410, the decision in the *Fleming* Case was followed.

<sup>38</sup> *McCue v. Barclay* (1902) 4 Sc. Sess. Cas. 5th series, 909, 39 Scot. L. R. 690, 10 Scot. L. T. 116.

<sup>39</sup> *Appleby v. Horseley Co.* [1899] 2 Q. B. (Eng.) 521, 80 L. T. N. S. 853, 68 L. J. Q. B. N. S. 892, 47 Week. Rep. 614; *Rothwell v. Davies* (1903) 19 Times L. R. (Eng.) 423.

A workman who had been employed from time to time as his labor was required, and who had worked continuously from the 11th to the 28th of November, upon which latter day he was injured, but had not worked from the second to the 10th of that month, is entitled to compensation calculated with reference to his weekly earnings during the period of continuous employment. *Giles v. Belford* [1903] 1 K. B. (Eng.) 843, 72 L. J. K. B. N. S. 569, 51 Week. Rep. 692, 88 L. T. N. S. 754, 67 J. P. 399, 19 Times L. R. 422.

Where a workman had been working for L.R.A.1916A.

the employer for more than a year, when he left and went to Canada and was employed at a much higher wage, and returned to England for the purpose of removing his family to Canada, and while there temporarily returned to his old employment and worked for nine weeks at an average wage considerably lower than that which he received during the previous employment, the county court judge has jurisdiction to compute the rate of remuneration from the period of the nine weeks during the time which the workman had been employed since his return from Canada, and was entitled to take into consideration the workman's intention to leave the country; and the facts that the wages would have been higher at another period of the year, and that he had been hindered by the weather, were immaterial. *Godden v. Cowlin* [1913] 1 K. B. (Eng.) 590, 82 L. J. K. B. N. S. 509, 108 L. T. N. S. 166, 29 Times L. R. 255, 57 Sol. Jo. 282, [1913] W. N. 37, [1913] W. C. & Ins. Rep. 330, 6 B. W. C. C. 154.

<sup>40</sup> *Grewar v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 895, 39 Scot. L. R. 687, 10 Scot. L. T. 111.

<sup>41</sup> There is no break in the workman's employment where he goes away on a holiday. *Keast v. Barrow Haematite Steel Co.* (1899) 15 Times L. R. (Eng.) 141, 63 J. P. 56, 1 W. C. C. 99.

In *Jones v. Ocean Coal Co.* [1899] 2 Q. B. (Eng.) 124, 68 L. J. Q. B. N. S. 731, 47 Week. Rep. 484, 80 L. T. N. S. 582, 15 Times L. R. 339, while it was declared that, while the average of the weekly earnings should not be reduced by taking into account a part of the year during which the relation of master and servant did not exist, a different rule was applicable where the relation continued, and the men did not work simply because there was nothing for them to do.

<sup>42</sup> *Williams v. Poulson* (1899) 16 Times L. R. (Eng.) 42, 63 J. P. 757, 2 W. C. C. 126.



join them. There must be some contract, express or implied, which raises a reasonable expectation of continuity in the employment. In the absence of that nexus, casual engagements on noncontract days do not constitute one continuous employment, for they are not bound together."<sup>43</sup> To bring about that consequence there must have been an actual interruption for the time being of the relation of master and servant. Whether there has been such an interruption is to be determined from the evidence, as a question of fact.<sup>44</sup>

### 8. Deductions.

In one case the court of appeal ap-

<sup>43</sup> Collins, L. J., in *Hathaway v. Argus Printing Co.* [1901] 1 K. B. (Eng.) 96. There a workman was under an agreement to work for his employers on the nights of Thursday and Friday in each week, for a period extending over two weeks, and at a fixed rate of wages for each night. During the rest of the week he worked, at times, for the same employers, when they had work to give him, and at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement, and an award was made in his favor, based on the weekly wages earned by him in respect of the two nights a week during which he worked under the agreement. On appeal it was held (1) that the employment for two nights a week was a continuous one, and that the earnings of those two nights were properly taken into account in determining the weekly payment to be made to the applicant; (2) that the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of the applicant.

<sup>44</sup> A workman was in the employment of the defendants as a riveter at a weekly wage of £2, 10s., from the 27th of September, 1895, to the 16th of March, 1896, when he was injured by an accident which incapacitated him for eleven months, during which time he did not work, and earned no wages. In February, 1897, the defendants employed him as a time keeper at a weekly wage of £1, 10s., and he continued in such employment until the 27th of September, 1898, when he was killed by an accident. Held, that for the purpose of calculating the compensation payable, the period of the workman's employment by the defendants had been less than three years, and that his "average weekly earnings" must be calculated with reference only to the period between the time when he resumed work and the date of his death. *Appleby v. Horseley Co.* [1899] 2 Q. B. (Eng.) 521, 68 L. J. Q. B. N. S. 892, 80 L. T. N. S. 853, 47 Week. Rep. 614, 15 Times L. R. 410.

A finding that the employment was not L.R.A.1916A.

proved of the course followed by an arbitrator, who disregarded a weekly deduction from the workman's wages which, under the employer's rules, was made on account of lamp oil supplied to him, and took the full amount of his weekly wages as the basis of the award.<sup>45</sup> This course has been approved by the House of Lords.<sup>46</sup> In another case the court of appeal intimated its opinion, but did not expressly decide, that the value of the tuition given to an apprentice should not be taken into account in computing the amount of his "average weekly earnings."<sup>47</sup> In another case it was held by the Scotch court of sessions that, in estimating the average earnings of a

continuous was held justifiable in a case where the workman had been absent eleven weeks on account of sickness, although when he resumed work no fresh engagement was entered into. *Hewlett v. Hepburn* (1899) 16 Times L. R. (Eng.) 56.

A period of six weeks during which the servant was disabled from work, owing to a previous accident, constitutes a break in the employment, and any compensation that may be due for a second injury received after resuming work must be ascertained with reference to the period which had elapsed between the resumption of work and the occurrence of the second accident, upon which the claim is based. *Gibb v. Dunlop* (1902) 4 Sc. Sess. Cas. 5th series, 971, 39 Scot. L. R. 750, 10 Scot. L. T. 184.

Such portion of the period of one year preceding the injury as occurred prior to a strike during which the injured workman was not employed, and after the termination of which he re-entered the employment under a new agreement, is not to be considered. *Jones v. Ocean Coal Co.* [1899] 2 Q. B. (Eng.) 124, 68 L. J. Q. B. N. S. 731, 47 Week. Rep. 484, 80 L. T. N. S. 582, 15 Times L. R. 339.

<sup>45</sup> *Houghton v. Sutton Health & L. G. Collieries Co.* [1901] 1 K. B. (Eng.) 93, 83 L. T. N. S. 472, 70 L. J. Q. B. N. S. 61, 65 J. P. 134, 49 Week. Rep. 196, 17 Times L. R. 54.

<sup>46</sup> In estimating the compensation payable to an injured servant under the workmen's compensation act 1897, the word "earnings" in the act means the sum the workman receives for his labor when he comes to it properly equipped according to the general understanding and practice in the particular trade. *Abram Coal Co. v. Southern* [1903] A. C. (Eng.) 306, 72 L. J. K. B. N. S. 691, 89 L. T. N. S. 103, 19 Times L. R. 579. It was accordingly held that the earnings of a collier from whose weekly wages were deducted by agreement sums for cleaning lamps, supply of oil, sharpening wicks, and checking weights, were his full wages without the deductions. The decision of the court of appeal in the *Houghton Case* was approved.

<sup>47</sup> *Pomphrey v. Southwark Press* [1901]

servant who was paid according to his output, nothing is to be deducted in respect to the value of the services of his son, whom he employed as an assistant, without paying him anything.<sup>43</sup> But the wages of a "drawer" or assistant, which were, in accordance with custom, included in the remuneration given the miner, are to be deducted.<sup>49</sup> The cost of explosives used by a miner, although procured from the employer, who deducts the cost thereof from the miner's wages, is not to be deducted in estimating the average weekly earnings of the miner.<sup>50</sup> But the English court of appeal has held that the cost of powder furnished a gang of miners is to be considered and deducted where the gang was paid for the amount of sand and stone gotten out, and the amount earned, less the cost of the powder, was given to the head of the gang, who gave to each miner his aliquot part. This case, however, was distinguished in various ways by the judges delivering judgment.<sup>51</sup>

Under the act of 1897 it was held by

1 K. B. (Eng.) 86, 83 L. T. N. S. 468, 70 L. J. Q. B. N. S. 48, 65 J. P. 148, 17 Times L. R. 53.

<sup>48</sup> Nelson v. Kerr (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Scot. L. R. 645, 9 Scot. L. T. 83.

<sup>49</sup> McKee v. Stein [1910] S. C. 38, 47 Scot. L. R. 39, 3 B. W. C. C. 544.

<sup>50</sup> Where a miner was in the habit of purchasing the explosives which he required for his work from his employers, and the price of these was retained by them from his wages, the cost of explosives does not represent a sum paid to the miner "to cover any special expenses." (Scot.) Ibid.

<sup>51</sup> Shipp v. Frodingham Iron & Steel Co. [1913] 1 K. B. (Eng.) 577, 82 L. J. K. B. N. S. 273, 108 L. T. N. S. 55, 29 Times L. R. 215, 57 Sol. Jo. 264 [1913] W. N. 16, [1913] W. C. & Ins. Rep. 230, 6 B. W. C. C. 1, Ann. Cas. 1914C, 183. Cozens-Hardy, M. R., said that there was a contract to pay the workman only his aliquot share of the net earnings; that is, the gross earnings of the gang, less the value of the powder. Buckley, L. J., said that each man was not paid according to the amount which he individually got out, and was not charged with the amount of powder which he used. Hamilton, L. J., said that the wages were fixed only after the powder had been deducted.

<sup>52</sup> Midland R. Co. v. Sharpe [1904] A. C. (Eng.) 349, 73 L. J. K. B. N. S. 666, 91 L. T. N. S. 181, 20 Times L. R. 546, 53 Week. Rep. 114. Against the contention that it was the amount of "profits" which a workman made which was to be considered in fixing the compensation, Lord Davey said that it was the actual amount of his remuneration that was to be looked to, and there was not to be taken into account the L.R.A.1916A.

the House of Lords that allowances for expenses for board and lodging while the workman was away from home constituted part of his earnings.<sup>52</sup> But this decision is no longer authority, in view of the express provision of schedule 1, ¶ 2 (d), of the act of 1906.

### 9. Remuneration other than regular wages.

"Earnings in the employment" do not always come from the employer.<sup>53</sup> So, where the giving and receiving "tips" are notorious, the money thus received is to be included in the "average weekly earnings."<sup>54</sup> The "average weekly earnings" do not include weekly payments by way of compensation for a previous accident,<sup>55</sup> nor an amount received from the poor fund.<sup>56</sup>

In determining the average weekly earnings of a seaman who is paid a certain sum per week, and his board and lodgings on a ship, the cost to the employer of the food and a reasonable allowance for the lodging has been taken

expenses which he had to incur in putting himself in a position to earn the money.

<sup>53</sup> Penn v. Spiers [1908] 1 K. B. (Eng.) 766, 77 L. J. K. B. N. S. 542, 98 L. T. N. S. 541, 24 Times L. R. 354, 52 Sol. Jo. 280, 1 B. W. C. C. 401, 14 Ann. Cas. 335.

<sup>54</sup> (Eng.) Ibid.

The county court judge in calculating the average weekly earnings of an employee may take into consideration tips obtained by the workman, although they were given for services outside the regular employment. Knott v. Tingle Jacobs & Co. (1911) 4 B. W. C. C. (Eng.) 55.

In Hains v. Corbet (1912) 5 B. W. C. C. (Eng.) 372, the court of appeal held that the finding of the county court judge as to the amount of wages which a workman was receiving at the time of the injury was conclusive, although the county court judge had admittedly made an error in refusing to take into consideration tips and commissions earned by the workman, so that the workman was not entitled to compensation upon resuming work, where his wages were higher than what the county court judge had in the first instance found them to be, although such wages were not as large as his prior wages, and the tips together were.

<sup>55</sup> Gough v. Crawshay Bros. [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 374.

<sup>56</sup> The amount of the poor relief paid to a workman employed by a distress committee under the unemployed workman act 1905 is not to be taken into account in calculating the amount of the compensation payable by the distress committee. Gilroy v. Mackie [1909] S. C. 466, 46 Scot. L. R. 325.



as the value to the workman.<sup>57</sup> But in another case in the same court it was said that the true test was the actual value to the workman of the board furnished by the employer.<sup>58</sup>

The steward of a vessel is entitled to have a monthly bonus received from his employers when satisfied with his work, and the profits which he makes on the sale of whisky at the bar of the vessel, taken into consideration in fixing his average earnings.<sup>59</sup> The right to use a uniform, which remains the property of the employer, must be treated as part of the workman's earnings.<sup>60</sup>

*f. Medical examination of injured workman (§§ 4, 14, 15).*

The first schedule provides that the employer may require the workman to submit to a medical examination under two different situations. First, by § 4, when he has given notice of an accident and thereby asserts a claim to compensation; second, by § 14, where he has been receiving compensation. These sections do not overlap, as they deal with different states of facts.<sup>61</sup> Paragraph 15 covers the practice in either case. Upon the refusal of the workman to be medically examined, the county court judge is authorized to suspend proceedings pending examination, provided he finds the refusal to be unreasonable.<sup>62</sup>

The court of appeal laid down the rule that § 4 applied in every case in which the workman's right to compensation had not been fixed by an agreement or by an award of an arbitrator.<sup>63</sup> But the House of Lords held that § 4 applies in every case in which compensation was not actually being paid at the time of the application, although such payments had

been made, but had been discontinued.<sup>64</sup> In each of these decisions it was held that it applies to a case where the employers had been voluntarily paying full compensation, had terminated such payment, and the workman then commenced proceedings. The House of Lords further held that under § 4, the right to require the workman, who has given notice of an accident, to submit to an examination, is not confined to a single examination.<sup>65</sup> The mere fact that an employer has made no objection to the commencement of proceedings, on the ground that no notice of the accident was given by the workman, does not warrant the inference of a waiver by the employer of his right to compel the workman to submit to a medical examination, nor justify the arbitrator in imposing terms upon the employer, as a condition of his obtaining an order that the workman shall be examined.<sup>66</sup>

The view has been taken by the court of appeal that the words "receiving weekly payments," as used in § 14, mean not only payments to a man who, up to the moment of his refusal, was getting week by week the money paid into his hands, but also to a man who, whether receiving it in money or not, is entitled to receive it under some enforceable right.<sup>67</sup> The House of Lords subsequently, however, laid down the rule that § 14 does not apply in a case in which payments were not being made at the time of the request for an examination, whether payments had formerly been made or not, and whether or not there was any award or agreement as to such payment.<sup>68</sup>

Under the act of 1897, a workman who while receiving compensation sub-

<sup>57</sup> *Rosenqvist v. Bowring* [1908] 2 K. B. (Eng.) 108, 77 L. J. K. B. N. S. 545, 98 L. T. N. S. 773, 24 Times L. R. 504.

<sup>58</sup> *Dothie v. MacAndrew & Co.* [1908] 1 K. B. (Eng.) 803, 77 L. J. K. B. N. S. 388, 98 L. T. N. S. 495, 24 Times L. R. 326.

<sup>59</sup> *Skailles v. Blue Anchor Line* [1910] W. N. 267, 27 Times L. R. 119, 55 Sol. Jo. 107.

<sup>60</sup> *Great Northern R. Co. v. Dawson* [1905] 1 K. B. (Eng.) 331, 74 L. J. K. B. N. S. 271, 53 Week. Rep. 309, 92 L. T. N. S. 145, 21 Times L. R. 193.

<sup>61</sup> *Major v. South Kirkby, F. & H. Collieries* [1913] 2 K. B. (Eng.) 145, 82 L. J. K. B. N. S. 452, 108 L. T. N. S. 538, 29 Times L. R. 223, 57 Sol. Jo. 244, [1913] W. N. 17, [1913] W. C. & Ins. Rep. 305, 6 B. W. C. C. 169, Ann. Cas. 1914C, 81.

<sup>62</sup> *Longhurst v. The Clement* [1913] W. C. & Ins. Rep. (Eng.) 312, 6 B. W. C. C. 218.

<sup>63</sup> *Major v. South Kirkby, F. & H. Collieries* L.R.A.1916A.

ies, and *Longhurst v. The Clement* (Eng.) supra.

<sup>64</sup> *Smith v. Davis* [1915] A. C. (Eng.) 528, 31 Times L. R. 356, [1915] W. N. 152, 59 Sol. Jo. 397.

<sup>65</sup> The county court judge is justified in making an order suspending a workman's right to compensation where he refused to submit to a medical examination under § 4 of the first schedule, at the time when he took proceedings to enforce his claim for compensation, although he had submitted to an examination at the time of making his claim, about three months previously. *Smith v. Davis* (Eng.) supra.

<sup>66</sup> *Osborn v. Vickers* [1900] 2 Q. B. (Eng.) 91, 69 L. J. Q. B. N. S. 606, 82 L. T. N. S. 491, 16 Times L. R. 333.

<sup>67</sup> *Hamilton, L. J.*, in *Major v. South Kirkby, F. & H. Collieries* (Eng.) supra.

<sup>68</sup> *Smith v. Davis* (Eng.) supra. Lord Loreburn, L. C., said: "I cannot see why they are not applicable to the case of a

mits to an examination by a medical practitioner provided by the employer need not submit to an examination by one of the referees appointed under the second schedule of the act, but may file a request for arbitration upon the employer's discontinuing the compensation.<sup>69</sup> The provision of the act under which these cases arose (a portion of ¶ 11) was omitted from the corresponding paragraph (14) of the act of 1906.

The workman is not entitled as a matter of right to have his own doctor present at the examination.<sup>70</sup> Whether or not he is so entitled is a question of fact to be determined by the arbitrator.<sup>71</sup> It is a refusal to submit to an examination where the workman refuses to be examined except at his solicitor's office or in his presence.<sup>72</sup> A workman does not necessarily obstruct a medical examination, within the meaning of the act, by going into another country and refusing to return for an examination unless his

expenses are paid.<sup>73</sup> So, a workman who is receiving compensation does not obstruct the holding of a medical examination within ¶ 14, schedule I. of the act by enlisting and going with his regiment to India, since he was acting under military orders, and was not intending to reside permanently outside of the United Kingdom.<sup>74</sup> But an injured workman who is in receipt of weekly payments and who goes to Australia without intimating to his employers that he is going, or without leaving his address, obstructs the medical examination in the sense of these paragraphs of the first schedule.<sup>75</sup> As to the effect of refusal to have an operation performed, see notes 26 et seq. ante, 139.

The report of a medical practitioner appointed for the purpose of the act is conclusive upon the question whether the incapacity arising from the injury has ceased.<sup>76</sup> And the county court judge is justified in following the report of

man who is receiving weekly payments by oral agreement just as much as if a memorandum had been recorded, or as if the sums were payable under an award. The purpose seems to me to be exactly what the words say. If the employer for any reason does not make the weekly payment, he has no right to have a medical examination under these provisions, and he and the workman are left to their rights without the obligation on the workman of submitting to the examination imposed by these provisions. If, on the other hand, the workman is receiving weekly payments under the act, it does not signify whether there is a memorandum or an award or an unrecorded agreement, provided that the man is in fact being paid in respect of the rights conferred upon him by the act. It would be different if the money were being paid as an act of mere charity or benevolence, for in that case no part of the act has any application.<sup>77</sup>

<sup>69</sup> *Niddrie & B. Coal Co. v. McKay* (1903) 5 Sc. Sess. Cas. 5th series, 1121, 40 Scot. L. R. 798, 11 Scot. L. T. 275; *Neagle v. Nixon's Nav. Co.* [1904] 1 K. B. (Eng.) 339, 73 L. J. K. B. N. S. 165, 68 J. P. 297, 52 Week. Rep. 356, 90 L. T. N. S. 49, 20 Times L. R. 160; *Strannigan v. Baird* (1904) 6 Sc. Sess. Cas. 5th series, 784, 41 Scot. L. R. 609, 12 Scot. L. T. 152. *Davidson v. Summerlee & M. Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series, 991, 40 Scot. L. R. 764, 11 Scot. L. T. 269, was disapproved in the other two Scotch cases which were decided in the other division of the court.

<sup>70</sup> *Morgan v. Dixon* [1912] A. C. (Eng.) 74, 81 L. J. P. C. N. S. 57, 105 L. T. N. S. 678, 28 Times L. R. 64, 56 Sol. Jo. 88, [1912] S. C. (H. L.) 1, 49 Scot. L. R. 45, 5 B. W. C. C. 184, [1911] W. N. 220, [1912] W. C. Rep. 43.

<sup>71</sup> In *Devitt v. The Bainbridge* [1909] 2 K. B. (Eng.) 802, 78 L. J. K. B. N. S. L.R.A.1916A.

1059, 101 L. T. N. S. 299, it was held that a workman did not refuse to be examined, in telling a medical man sent by the employers to examine him, that he did not object to a physical examination, provided his own physician was present.

There is no refusal to submit, under sched. I., ¶ 14, where the workman offers to submit to an examination at the surgery of his doctor. *Harding v. Royal Mail Steam Packet Co.* (1911) 4 B. W. C. C. (Eng.) 59. The court held that the workman's request was not unreasonable.

<sup>72</sup> *Warby v. Plaistowe* (1910) 4 B. W. C. C. (Eng.) 67. *Cozens-Hardy, M. R.*, said that a solicitor's office is not, under ordinary circumstances, a proper place at which to hold a medical examination of a workman.

<sup>73</sup> Where a workman receiving compensation fixed by agreement, who had twice submitted himself for examination by a medical practitioner provided by the employers, and been certified not to have recovered, immediately after the second examination went to Ireland to reside with his father, by refusing another examination unless his expenses were paid, where he offered to submit himself for examination to a medical man near the place where he was residing, did not refuse to submit himself to medical examination, or obstruct the same, in the sense of the workmen's compensation act 1897, sched. I., § 11. *Baird v. Kane* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 461.

<sup>74</sup> *Harrison v. Dowling* (1915) 31 Times L. R. (Eng.) 486.

<sup>75</sup> *Finnie v. Duncan* (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 254.

<sup>76</sup> *Ferrier v. Gourlay Bros.* (1902) 4 Sc. Sess. Cas. 5th series, 711, 39 Scot. L. R. 453, 9 Scot. L. T. 517; *McAvan v. Boase Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th series,



the medical referee.<sup>77</sup> Although the medical report is final, so far as it relates to the physical capacity of the workman, it may be in such form as to entitle him to proof as to his wage-earning capacity.<sup>78</sup> But the rule is different where the report of the medical referee covers both the physical capacity and the wage-earning ability of the workman.<sup>79</sup> When the report of the referee is unintelligible, the arbitrator may send back the report for an explanation as to its meaning.<sup>80</sup>

*g. Payments to dependents (§§ 5-7).*

It is the dependents of the deceased workman, and not his personal representative, who is entitled to the compensation money. Thus it has been held that the portion of compensation which had been apportioned to the widow of a workman who also left dependent children, which portion had not been disposed of at the death of a widow, does not belong to the personal representative, but to the other dependents, who are entitled to have a reapportionment.<sup>81</sup> So, where an application for

compensation is made by the legal personal representative of a deceased workman, on behalf of himself and other dependents of the workman, the county court judge or other arbitrator has jurisdiction to order so much of the compensation as is allotted to the dependents, to be paid to the county court registrar for investment in his name on their behalf, and is not compelled to order it to be paid to the legal personal representative.<sup>82</sup>

Where neither the employer nor the wife nor the daughter of the deceased workman was before the court, no order will be made by the court on the application of the medical resident superintendent of the insane asylum, of which the wife had been an inmate for many years, to have apportioned between the wife and daughter the sum which had been agreed upon as compensation for the workman's death.<sup>83</sup>

The arbitrator must allot the compensation money among the dependents in such portion as he thinks right; and he has no power, where there are minor dependents, to direct the payment of the

1048, 38 *Scot. L. R.* 772, 9 *Scot. L. T.* 152; *Arnott v. Fife Coal Co.* [1911] *S. C.* 1029, 48 *Scot. L. R.* 828, 4 *B. W. C. C.* 361.

The report of the medical referee, so far as it relates to the physical capacity of the workmen, is final. *Cruden v. Wemyss Coal Co.* [1913] *S. C.* 534, 50 *Scot. L. R.* 344, [1913] *W. C. & Ins. Rep.* 188, 6 *B. W. C. C.* 393.

A certificate of a medical referee, procured in accordance with sched. I., ¶ 15, that a workman is fit to work, is conclusive. *Sapcote v. Hancock* (1911) 4 *B. W. C. C.* (*Eng.*) 184.

The certificate of the statutory medical officer must be accepted by the trial judge as conclusive evidence of the workman's condition as of the time when it is given. *Bryce v. Connor* (1904) 7 *Sc. Sess. Cas.* 5th series (*Scot.*) 193.

<sup>77</sup> *Parry v. Rhymney Iron & Coal Co.* (1912) 5 *B. W. C. C.* (*Eng.*) 632.

<sup>78</sup> Where a medical referee has reported that a miner who has lost an eye is as fit to work underground as any one-eyed man is, the miner is entitled to a proof of his earning capacity. *Arnott v. Fife Coal Co.* [1911] *S. C.* 1029, 48 *Scot. L. R.* 828, 4 *B. W. C. C.* 361.

Upon a subsequent appeal [1912] *S. C.* 1262, 49 *Scot. L. R.* 902, 6 *B. W. C. C.* 281, it was held that proof that the miner had done no work under ground since the accident, and had made various unsuccessful applications for work; that it was impossible to say whether, if he had returned to work underground, he would have regained his former earning capacity; that the earning capacity of a one-eyed miner must be *L.R.A.*1916A.

judged on each individual case; that his weekly salary was reduced more than 50 per cent after the accident; and that it was not proved by the employers that if the miner had been working underground he would have been earning more than he was above ground,—justifies the dismissal of the employer's application for a review of the compensation.

To the same general effect, *Cruden v. Wemyss Coal Co.* (*Scot.*) *supra*, which was also the case of a one-eyed miner.

<sup>79</sup> Where the fitness of an injured miner had been referred to a medical referee under schedule I. (15), and the medical referee said that the man was in good health and quite fit to resume his employment as a coal miner, having recovered from the accident, it is not error for the arbitrator to end the compensation, and refuse to admit evidence to show that the workman's earning ability had been reduced, notwithstanding the fact that he had, from a medical point of view, recovered from the accident. *Gray v. Shotts Iron Co.* [1912] *S. C.* 1267, 49 *Scot. L. R.* 906, 6 *B. W. C. C.* 287.

<sup>80</sup> *Kennedy v. Dixon* [1913] *W. C. & Ins. Rep.* 333, [1913] *S. C.* 659, 50 *Scot. L. R.* 453, 6 *B. W. C. C.* 434.

<sup>81</sup> *Ivey v. Ivey* [1912] 2 *K. B.* (*Eng.*) 118, 81 *L. L. K. B. N. S.* 819, 106 *L. T. N. S.* 485, 5 *B. W. C. C.* 279.

<sup>82</sup> *Daniel v. Ocean Coal Co.* [1900] 2 *Q. B.* (*Eng.*) 250, 82 *L. T. N. S.* 523, 69 *L. J. Q. B. N. S.* 567, 64 *J. P.* 436, 48 *Week. Rep.* 467, 16 *Times L. R.* 368, 2 *W. C. C.* 135.

<sup>83</sup> *Kerr v. Stewart* (1909) 43 *Ir. L. T.* 119, 2 *B. W. C. C.* 454.

compensation to trustees, to be invested or otherwise applied by such trustees for the benefit of the dependents, in such manner as the trustees may, from time to time, deem expedient.<sup>84</sup> The arbitrator has no power to make an award so as to exclude any dependents who are not sui juris, and capable of renouncing their rights under the act.<sup>85</sup> When the total amount of compensation has been agreed upon, the employer is not to be brought in to settle the quantum which is to be paid to any one of the persons who are dependents of the deceased workman.<sup>86</sup> Arbitration is not necessary merely to distribute among the dependents of a deceased workman the compensation which the employers admit is due; it should be brought to the county court and lodged to their credit.<sup>87</sup> And the employers have no right to insist that the dependents take out letters of administration as a condition precedent to their paying compensation.<sup>88</sup>

*h. Determination of question who are dependents (§ 8).*

It is the duty of the arbitrator, in determining the question whether the claimant was a dependent, to decide incidentally her relationship to the deceased.<sup>89</sup>

*i. Varying of the award (§ 9).*

Where the arbitrator, upon the death of a workman, awarded a certain compensation to his widow and four children in certain proportions, and the

widow subsequently died, the circumstances are varied so that the arbitrators have power to vary the award under ¶ 9 or schedule I.<sup>90</sup> So upon the death of a workman, as the result of his injury, a new award may be made in behalf of the dependent, although an award had been previously made in behalf of the workman himself.<sup>91</sup>

*j. Review of weekly payments (§ 16).*

The review provided for by schedule I. (16), is not a review in the nature of an appeal from the award made in the first instance by the arbitrator, but a review directed to the question whether, owing to changed conditions, these weekly payments should be increased, diminished, or made to cease.<sup>92</sup>

Where the workman or employer is desirous of having the amount of payment changed, the method of procedure is prescribed in ¶ 16 of the first schedule. It has been said that the act does not grant a life annuity in the form of weekly payments to an injured workman.<sup>93</sup> But it is proper that an award should be made in such form that it will continue payments until one of the parties shall come in and show that the original award should be changed. So, an award of compensation "to continue during the total or partial incapacity" of the workman is not ultra vires in that it attempts to give at the same time compensation for both the ascertained total incapacity and the unascertained future partial incapacity.<sup>94</sup>

<sup>84</sup> *Manchester v. Carlton Iron Co.* (1904) 68 J. P. (Eng.) 209, 52 Week. Rep. 291, 89 L. T. N. S. 730, 20 Times L. R. 155, 6 W. C. C. 135.

<sup>85</sup> (Eng.) Ibid.

<sup>86</sup> *Rhodes v. Soothill Wood Colliery Co.* [1909] 1 K. B. (Eng.) 191, 78 L. J. K. B. N. S. 141, 100 L. T. N. S. 15, [1908] W. N. 252, 2 B. W. C. C. 377.

<sup>87</sup> *Harland v. Radcliffe* (1909) 43 Ir. L. T. 166, 2 B. W. C. C. 374.

<sup>88</sup> *Clatworthy v. Green* (1902) 86 L. T. N. S. (Eng.) 702, 66 J. P. 596, 50 Week. Rep. 610, 18 Times L. R. 641, 4 W. C. C. 152.

*Brown v. London & N. W. R. Co.* (1899; C. C.) 1 W. C. C. (Eng.) 147, in which it was held that if the workman was killed, letters of administration must be taken out, has in effect been overruled by the court of appeal in *Clatworthy v. Green*.

<sup>89</sup> *Johnstone v. Spencer* [1908] S. C. 1015, 45 Scot. L. R. 802, 1 B. W. C. C. 302. This was the case of an illegitimate child.

But see *Wallace v. Fife Coal Co.* [1909] S. C. (Scot.) 682, where opinions were reserved on the question whether it was competent for the arbitrator in the arbitration proceedings to determine whether the claim-  
L.R.A.1916A.

ant was the widow of the deceased workman, and *Johnstone v. Spencer* (Scot.) supra, was distinguished.

<sup>90</sup> *Ivey v. Ivey* [1912] 2 K. B. (Eng.) 118, 81 L. J. K. B. N. S. 819, 106 L. T. N. S. 485, 5 B. W. C. C. 279.

<sup>91</sup> *O'Keefe v. Lovatt* (1902) 18 Times L. R. (Eng.) 57, 4 W. C. C. 109.

<sup>92</sup> *Gibson v. Wishart* (1914; H. L. Sc.) 30 Times L. R. 540, [1914] W. N. 232, 58 Sol. Jo. 592, 51 Scot. L. R. 516, 83 L. J. P. C. N. S. 321, 111 L. T. N. S. 466, [1914] S. C. (H. L.) 53, [1914] W. C. & Ins. Rep. 202, 7 B. W. C. C. 348.

<sup>93</sup> *Gray v. Reed* [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43.

<sup>94</sup> *Higgins v. Poulson* [1912] 2 K. B. (Eng.) 292, 81 L. J. K. B. N. S. 690, 106 L. T. N. S. 518, 28 Times L. R. 323, [1912] W. N. 90, [1912] W. C. Rep. 244, 5 B. W. C. C. 340. Buckley, L. J., said: "The whole contest is really this, whether the form of the order is to throw on the workman the task of coming from time to time to show that under altered circumstances he is entitled to such a sum, or whether it is to continue the payments until one of



A workman, upon the termination of an award to the effect that the employers were to provide him with a light employment at a fixed sum per week for the period of four weeks, and upon the employer's refusal to continue the light employment or to pay compensation, is not entitled to commence new proceedings; but his remedy lies in an application to review.<sup>95</sup>

In an early case arising under the act the language used by the judges intimated that a weekly payment awarded as compensation to an injured workman can be reviewed under this provision only in cases where the circumstances have changed since the making of the award.<sup>96</sup> The actual point decided, however, was that the court will not review an award merely upon the ground that a mistake had been made as to the amount of wages which the workman had been earning at the time of the accident. In a sub-

sequent case, the county court judge deemed himself bound by this decision and refused to review a nominal award to the applicant upon the ground that no change of circumstances had taken place; the court of appeal, however, held that the doctrine of *res judicata* does not apply to a finding as to the condition of the workman's health.<sup>97</sup> In subsequent decisions the court of appeal has made it plain that, upon an application to review, it is the condition of the workman at the time of the application that is to be inquired into and upon the review the compensation is to be increased, diminished, or terminated or a change refused, as the case may be, to the end that compensation be terminated or be paid in such amounts as the present condition of the workman entitles him to under the act.<sup>98</sup> The same view has been taken by the court of session.<sup>99</sup> There can, however, be no review in the absence

the parties comes and shows that the sum originally fixed should be varied. I think the act contemplates the latter form."

<sup>95</sup> *Watts v. Logan* [1914] W. C. & Ins. Rep. (Eng.) 48, 7 B. W. C. C. 82.

<sup>96</sup> *Crossfield v. Tanian* [1900] 2 Q. B. (Eng.) 629, 82 L. T. N. S. 813, 69 L. J. Q. B. N. S. 790, 48 Week. Rep. 609, 16 Times L. R. 476.

<sup>97</sup> *Sharman v. Holliday* [1904] 1 K. B. (Eng.) 235, 73 L. J. K. B. N. S. 176, 90 L. T. N. S. 46, 20 Times L. R. 135, 68 J. P. 151 (county court judge directed to entertain application of workman to review nominal award where he had showed that he could not obtain any work because of his condition). Collins, M. R., said: "In the first place, I have grave doubts whether the doctrine of estoppel by judgment ought to be extended to a case of this kind, where the decision of the county court judge on the first occasion was on a matter which was merely one of opinion, namely, whether the workman was in such a condition at a particular time as to be incapacitated from working in future. It may be a question which in many cases can only be conclusively decided by experiment, and in such a case, until it is so decided, the clearest opinion on that question on the part of the judge is founded merely on the evidence of experts, which may be displaced by the test of subsequent experiment. I can conceive a case in which the opinion of medical experts might be unanimous to the effect that a workman was capable of doing certain work, and yet, afterwards, upon his attempting to do it, he might find it impossible. Under such circumstances ought the doctrine of *res judicata* to apply in these cases, and the decision arrived at upon the evidence of experts to stand incontrovertible for ever? I do not think that such a subject-matter is one to which the doctrine of estoppel by judgment ought to be applied."

L.R.A.1916A.

<sup>98</sup> In *Cawdor & G. Collieries v. Jones* (1909) 3 B. W. C. C. (Eng.) 59, Cozens-Hardy, M. R., said: "The question for the county court judge is—aye or no—Is the workman in such condition that the compensation payments ought to be reduced?"

An award based upon medical opinion of a man's physical condition at one time in no way prevents a different award at a subsequent date, when experience may have proved that the views of the doctors were wrong. *Radcliffe v. Pacific Steam Nav. Co.* [1910] 1 K. B. (Eng.) 685, 79 L. J. K. B. N. S. 429, 102 L. T. N. S. 206, 26 Times L. R. 319, 54 Sol. Jo. 404, 3 B. W. C. C. 185.

Upon a second application to review weekly payments the issue is whether or not the workman is wholly or partially incapacitated, and it is error to exclude evidence tending to show that the medical evidence as to the man's condition given on the first review was wrong. *Mead v. Lockhart* (1909) 2 B. W. C. C. (Eng.) 398.

In *Thranmere Bay Development Co. v. Brennan* (1909) 2 B. W. C. C. (Eng.) 403, it was held that in an application to review the weekly payments the workman's present condition must be determined and it is not incumbent upon the employer to show that there has been a change in the condition since the last review or since the award.

It is the purpose of the act that an award when made shall continue until it is reviewed upon a showing that the workman's condition warrants a change in the compensation. *Higgins v. Poulson* [1912] 2 K. B. (Eng.) 292, 81 L. J. K. B. N. S. 690, 106 L. T. N. S. 518, 28 Times L. R. 323, [1912] W. N. 90, [1912] W. C. Rep. 244, 5 B. W. C. C. 340.

<sup>99</sup> In *Boag v. Lochwood Collieries* [1910] S. C. 51, 47 Scot. L. R. 47, 3 B. W. C. C. 549, the Lord Justice-Clerk said: "In

of any showing that there has been no change of any kind, either in the workman's physical condition or in his ability to get work, and that the prior award was not a proper one.<sup>1</sup>

Upon a review the employer is estopped from claiming that the workman did not earn the amount set out in the memorandum of the agreement.<sup>2</sup> An agreement for payment of compensation based on total incapacity cannot be reviewed on the application of the workman, upon the ground that his condition is worse.<sup>3</sup>

Upon an application for review, the mental or nervous condition of the workman is to be considered.<sup>4</sup> In the case of a minor, the arbitrator should refuse to consider a general increase in wages between the date of the agreement to make compensation, and the date of the application to review as per se, entitling the claimant to an increase in compensation; the question to be determined is what, as

a matter of fact, is the sum which the minor workman would have been earning on the particular date had he not been injured.<sup>5</sup>

The amount of the weekly payments need not necessarily be reduced merely because the applicant on account of increasing old age would not, even if uninjured, have been able to earn as much as before the accident.<sup>6</sup> An arbitrator has jurisdiction to terminate weekly payments upon evidence that the workman had entirely recovered,<sup>7</sup> but he has no jurisdiction to terminate an agreement for compensation.<sup>8</sup>

An application for a review of an award or of a recorded agreement may be made at any time without any question or dispute having arisen.<sup>9</sup> So, an application for review may be made by the employer at a time when no compensation is actually being paid, and no memorandum of agreement has been recorded.<sup>10</sup>

cases under the workmen's compensation act the matter is not final so long as a payment is being made, but it can only be reopened on the ground that the opinion arrived at before was wrong, because the man is now incapacitated to a different extent from that which was found to exist at the time when the compensation was assessed."

<sup>1</sup> *Cox v. Braithwaite* (1912) 5 B. W. C. C. (Eng.) 648. In this case there had been a prior review and the workman sought an increase as of a date prior to the first review. *Cozens-Hardy, M. R.*, said: "He might have maintained an application to review if he could have shown that since the decision of the court of appeal he had, being able to do this work, had no opportunity of getting it, although he had tried."

<sup>2</sup> *Gellyceidrim Colliery Co. v. Rogers* (1909) 3 B. W. C. C. (Eng.) 62; *Crossfield v. Tanian* [1900] 2 Q. B. (Eng.) 629, 69 L. J. Q. B. N. S. 790, 82 L. T. N. S. 813, 16 Times L. R. 476, 48 Week. Rep. 609.

<sup>3</sup> The county court judge is not authorized to review an agreement on the ground that the circumstances have changed where the agreement was for the payment of compensation during the continuance of total incapacity, although the payments to be made did not amount to one half of the wages, and subsequent to the agreement the workman had to undergo an operation consisting of the amputation of his arm, for an injury to which the compensation had been paid. *Scott v. Long Meg Plaster Co.* (1914) 7 B. W. C. C. (Eng.) 502. *Swinfen Eady, L. J.*, said: "The agreement says: As a compromise, the employers agree that the applicant is, and has been since December 7, 1912, totally incapacitated; and then upon that there is a compromise to pay, upon the footing of total incapacity, an agreed sum of six shillings

per week. In my opinion the subsequent amputation of the arm does not affect the position at all. It is an unfortunate result, but it does not affect the position. He has an allowance of six shillings a week upon the footing of total incapacity, and the subsequent amputation of the arm has not increased the totality of the incapacity."

<sup>4</sup> *Eaves v. Blaenclydach Colliery Co.* [1909] 2 K. B. (Eng.) 73, 78 L. J. K. B. N. S. 809, 100 L. T. N. S. 751.

The county court judge is justified in refusing to review the award of compensation to an injured workman, where there was evidence that although the workman, who was struck on the head by a brick, was physically able to do light work, he was suffering from neurasthenia resulting from the accident, and honestly believed himself incapable of working. *Waal v. Steel* (1915) 112 L. T. N. S. (Eng.) 846.

<sup>5</sup> *Malcolm v. Spowart* [1913] W. C. & Ins. Rep. 523, 50 Scot. L. R. 823, 6 B. W. C. C. 856.

<sup>6</sup> *Smith v. Hughes* (1905; C. C.) 8 W. C. C. (Eng.) 115.

<sup>7</sup> *Reyners v. Makin* (1911) 4 B. W. C. C. (Eng.) 267.

<sup>8</sup> *Taylor v. London & N. W. R. Co.* [1912] A. C. (Eng.) 242, 81 L. J. K. B. N. S. 541, 106 L. T. N. S. 354, 28 Times L. R. 290, 56 Sol. Jo. 323, [1912] W. C. C. 95, [1912] W. N. 53, 49 Scot. L. R. 1020, 5 B. W. C. C. 218.

<sup>9</sup> *Tyne Tees Shipping Co. v. Whitlock* [1913] 3 K. B. (Eng.) 642, 82 L. J. K. B. N. S. 1091, 109 L. T. N. S. 84, [1913] W. N. 237, 57 Sol. Jo. 716, [1913] W. C. & Ins. Rep. 579, 6 B. W. C. C. 559.

<sup>10</sup> An application by the employer to have the compensation terminated, or, in the alternative, to have an award of partial



The House of Lords has decided that, upon an application to terminate payment, the arbitrator may, upon finding that the incapacity has ceased, terminate the payment upon the date when it ceased, although such date is antecedent to the date of application for review.<sup>11</sup> This decision is based on the broad ground that the act provides for compensation only during incapacity, and when such incapacity ceases the workman has no claim whatsoever to any compensation; and the failure of the employer to make timely application for review does not have the effect of giving the workman a right which the act itself did not give him. There had previously been a disagreement between the lower English and Scottish courts as to whether the arbitrator, upon terminating the payment, had power to terminate as of the date of the application or only at the date of

the actual decision. Of course the decision of the House of Lords goes further than even those courts taking the first of the two views mentioned. The court of appeal in England took the view that when an application to review a weekly payment is brought before an arbitrator, he is not bound to treat the agreement for, or award of, a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined.<sup>12</sup> It was subsequently held by the same court that the arbitrator cannot in the absence of a special request award that the payment shall terminate from a date antecedent to the request for a review.<sup>13</sup> The earlier Scotch cases had taken a different view.<sup>14</sup>

compensation, is competent at a date when no compensation is actually being paid to the workman, the parties being in dispute as to the amount and duration of compensation, and no memorandum of agreement has been recorded. *Nelson v. Summerlee Iron Co.* [1910] S. C. 360, 47 Scot. L. R. 344; *Southhook Fire-Clay Co. v. Laughland* [1908] S. C. 831, 45 Scot. L. R. 664.

<sup>11</sup> If upon an application to review the county court judge finds that the applicant had recovered prior to the date of the application to review, he may terminate the compensation as of the date of recovery and not merely from the date of the application for review. *Gibson v. Wishart* (1914; H. L. Sc.) 30 Times L. R. 540, [1914] W. N. 232, 58 Sol. Jo. 592, 83 L. J. P. C. N. S. 321, [1914] W. C. & Ins. Rep. 202, 51 Scot. L. R. 516, 111 L. T. N. S. 466, 7 B. W. C. C. 348.

*Gibson v. Wishart* (Scot.) was followed in *Bagley v. Furness* [1914] 3 K. B. (Eng.) 974, 83 L. J. K. B. N. S. 1546, [1914] W. N. 300, 7 B. W. C. C. 560.

<sup>12</sup> *Morton v. Woodward* [1902] 2 K. B. (Eng.) 276, 71 L. J. K. B. N. S. 736, 66 J. P. 660, 51 Week. Rep. 54, 86 L. T. N. S. 878, 4 W. C. C. 143.

<sup>13</sup> *Charing Cross, E. & H. R. Co. v. Boots* [1909] 2 K. B. (Eng.) 640, 78 L. J. K. B. N. S. 1115, 101 L. T. N. S. 53, 25 Times L. R. 683, 2 B. W. C. C. 385; *Upper Forest & Western Steel & Tinplate Co. v. Thomas* [1909] 2 K. B. (Eng.) 631, 78 L. J. K. B. N. S. 1113.

The decision in *Hosegood v. Wilson* [1911] 1 K. B. (Eng.) 30, 80 L. J. K. B. N. S. 519, 103 L. T. N. S. 516, 27 Times L. R. 88, 4 B. W. C. C. 30, was to the effect that where the arbitrator had reduced the payment as of the date prior to the application, the employer could not treat the excess he had paid subsequent to that date as payment pro tanto in advance on the reduced payment for compensation. L.R.A.1916A.

<sup>14</sup> The Scottish court of sessions, in *Donaldson Bros. v. Cowan* [1909] S. C. 1292, 46 Scot. L. R. 920, 2 B. W. C. C. 390, adopted the view of the English court of appeal as expressed in *Morton v. Woodward* (Eng.) supra.

The Scottish case above cited overruled earlier Scotch cases to the effect that in an application, under ¶ (12) of the first schedule to the workmen's compensation act 1897, to review a weekly payment under the act, the arbitrator has power to end, diminish, or increase the payments only as from the date of his decision in the application. *Steel v. Oakbank Oil Co.* (1902) 5 Sc. Sess. Cas. 5th series, 244, 40 Scot. L. R. 205, 10 Scot. L. T. 505; *Pumpherson Oil Co. v. Cavaney* (1903) 5 Sc. Sess. Cas. 5th series, 963, 40 Scot. L. R. 724, 11 Scot. L. T. 171; *Baird v. Stevenson* [1906-07] S. C. (Scot.) 1259.

In *Lochgelly Iron & Coal Co. v. Sinclair* [1909] S. C. (Scot.) 922, Lord Salveson recognized the earlier disagreement between the English and Scotch tribunals, and said: "One other matter has been conclusively settled by authority. Where the employer's liability to pay compensation has been judicially ascertained, either by an award of the arbitrator or by its equivalent, a recorded memorandum of agreement, such liability can only be terminated by the judgment of the arbitrator on an application made to him by the employer. On this matter all the judges who took part in the following three decisions, *Steel v. Oakbank Oil Co.*, *Pumpherson Oil Co. v. Cavaney* (Scot.) and *Morton v. Woodward* (Eng.) were absolutely agreed. There is no doubt a conflict between the Scotch and English tribunals as to the date on which the cesser of liability takes place,—the former holding that it can only operate from the date of the actual decision, while the view taken in England is that the arbitrator has jurisdiction to review the pay-

Whether or not an employer who has paid compensation to a workman after his incapacity has ceased is entitled to recover back such compensation, is discussed but not decided in the decision in the House of Lords.<sup>15</sup>

Upon an application to review, made by a workman, who at the date of the accident whereby he was injured was under twenty-one years of age, the increase, if any, allowable under the proviso of schedule I. ¶ 16, cannot be made from a date prior to the date of the application to review, since that proviso is solely for the benefit of the workman.<sup>16</sup>

Where an application for a review comes before the arbitrator at the same time as an application to register an agreement, he is not bound to grant war-

rant to record the agreement without awaiting the result of the proof in the proceeding to review.<sup>17</sup> But he cannot grant warrant to record the agreement and dismiss the application to review without finding what the wage-earning capacity of the workman is.<sup>18</sup> An award terminating weekly payments is, in the absence of an appeal, final; and another application for payments will be denied.<sup>19</sup> But where payments are made under an agreement, the mere report of the medical referee that the incapacity has ceased and the acquiescence of the applicant in the nonpayment for several weeks will not prevent the applicant from making further application for payment.<sup>20</sup>

ments as from the date of the application. If the question is to be still open, I should have no difficulty in concurring with the reasoning of the English judges in the case of Woodward, and with the opinion of the dissenting judges in the two Scotch cases."

In *Southhook Fire-Clay Co. v. Laughland* [1908] S. C. 831, 45 Scot. L. R. 664, 1 B. W. C. C. 405, it is held that on an application to review payments made under an unregistered agreement, an order may be made terminating the payment from the date when the incapacity ceased, since the unregistered agreement did not have the force of a decree. This supposed distinction between decree and unregistered agreement is disposed of by the decision of the House of Lords, cited above.

<sup>15</sup> *Gibson v. Wishart* (1914; H. L. Sc.) 30 Times L. R. 540, [1914] W. N. 232, 58 Sol. Jo. 592, 83 L. J. P. C. N. S. 321, [1914] W. C. & Ins. Rep. 202, 51 Scot. L. R. 516, 111 L. T. N. S. 466, 7 B. W. C. C. 348.

<sup>16</sup> *Williams v. Bwlfa & M. Dare Steam Collieries* [1914] 2 K. B. (Eng.) 30, 83 L. J. K. B. N. S. 442, 110 L. T. N. S. 561, [1914] W. N. 44, 7 B. W. C. C. 124.

<sup>17</sup> *McEwan v. Baird* [1909-10] S. C. (Scot.) 436; *McVey v. Dixon* [1909-10] S. C. (Scot.) 544.

In the *McEwan* Case, after referring to *Upper Forest & W. Steel & Tinplate Co. v. Thomas* [1909] 2 K. B. (Eng.) 631, 78 L. J. K. B. N. S. 1113, and *Charing Cross, E. & H. R. Co. v. Boots* [1909] 2 K. B. (Eng.) 640, 78 L. J. K. B. N. S. 1115, Lord Dunedin said: "They show, I think, conclusively, that the English courts proceed thus: Where the county court judge is applied to at one and the same time to register a memorandum and to vary a payment, their plan is to allow the memorandum to be registered, but to grant a stay of execution in order that the other matter may be taken up, and then, according as the decision in the other matter is one way or another, that stay of execution is either removed or not as the case may be."

<sup>18</sup> Where the employer objects to the filing of a memorandum of agreement, L.R.A.1916A.

upon the ground that incapacity has ceased, and asks that the payment be terminated, and the arbitrator finds that the man is still incapacitated to earn full wages but is fit for some work, the arbitrator must go further and pronounce a finding whether the wage-earning capacity of the respondent is gone, or, if not, to what amount of compensation, if any, he is entitled. *Smith v. Petrie* [1913] W. C. & Ins. Rep. 378, 50 Scot. L. R. 749, 6 B. W. C. C. 833.

<sup>19</sup> *Nicholson v. Piper* [1907] A. C. (Eng.) 215, 76 L. J. K. B. N. S. 856, 97 L. T. N. S. 119, 23 Times L. R. 620.

Where the county court judge has jurisdiction to make a final award or a suspensory award on an original application, and finds in favor of the employers and refuses to make an award, the matter is *res judicata* and cannot be opened at a subsequent application for compensation by the workman. *Green v. Cammell* [1913] 3 K. B. (Eng.) 665, 82 L. J. K. B. N. S. 1230, 109 L. T. N. S. 202, 29 Times L. R. 703, [1913] W. N. 259, 6 B. W. C. C. 735.

Payments of compensation having been ended by the arbitrator, on an application for a review under the first schedule, a new application was incompetent, and the workman cannot again obtain compensation in respect of the accident. *Cadenhead v. Ailsa Shipbuilding Co.* [1909-10] S. C. (Scot.) 1129.

<sup>20</sup> The certificate of the medical referee that incapacity has ceased does not bar a subsequent application to the sheriff by the workman against his employers for an award to fix the amount of compensation due in respect of an alleged supervening incapacity where no application was ever made by the employers for an order to end the compensation. *King v. United Collieries Co.* [1909-10] S. C. (Scot.) 42. Lord Low observed: "The obligation of the employers to give him weekly payments during incapacity has never been terminated in any way whatever. All that has been settled by the report of the medical referee is that at a certain date he was not incapacitated."



In view of the fact that an award terminating the compensation is final, there has grown up the custom of awarding a "penny a week" to a workman who is at the time of the application able to do his ordinary work, but is permanently injured, and may at any time again become incapacitated by reason of the injury. It is conceded that the statute makes no provision for such an award,

and the only apparent justification for it is that it is a recognized custom, is convenient, and prevents the injustice that would occur when the compensation has been terminated in cases where there may be a recurrence of the workman's incapacity which is due to the incident.

This custom has been held incompetent by both divisions of the court of session.<sup>21</sup> But it is upheld by the court of

<sup>21</sup> *Rosie v. Mackay* [1910] S. C. 714, 47 Scot. L. R. 654; *Clelland v. Singer Mfg. Co.* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 975.

In the latter case, Lord Adam observed: "The 13th section of the first Schedule, for example, gives to the employer, where weekly payments have been continued for not less than six months, a right to have his liability therefor redeemed by payment of a lump sum. This clause appears to me clearly to indicate that it was not intended that an employer's liability under the act should continue for an indefinite time, but that he should be able to get rid of it by payment of a lump sum at the end of six months. But it appears to me that the device of suspending the weekly payments, and substituting therefor the payment of a nominal sum of a penny, would render that clause practically inoperative. It was admitted on both sides that the payment of the nominal sum of a penny could not be treated as a weekly payment under the act. If that be so, then in this case, for example, in which the weekly payments ceased at the end of four months, if the appellants were to apply to have their liability under the act redeemed by payment of a lump sum, they would be met by the plea that the weekly payments had not been continued for the necessary period of six months. I see no answer to that plea, with the result that the appellant's liability under the act would be continued indefinitely. I think that the act assumes that the weekly payments are to be continuous, and if at the end of six months an application is made by an employer to an arbiter for redemption of his liability by payment of a lump sum, the arbiter must apply his mind to the facts as then existing, and determine the amount of that sum to the best of his ability. So I think that when an application is made to an arbiter, under the 12th section, to review a weekly payment, he must apply his mind to the facts as they exist at the time, and either diminish, increase, or end the payment, or, by refusing the application, continue it, but that he has no power under the act to suspend it."

In the case of *Rosie v. Mackay* (Scot.) Lord Low, recognizing the hardship which might follow the rule laid down by the Scottish courts, said that the provision of the twelfth paragraph of the first schedule—that upon review the weekly payments may be "ended, diminished or increased"—merely indicated generally the scope of the

arbiter's jurisdiction, and was not an exhaustive review of his powers, and did not necessarily exclude another course if the justice of the case so required. He further observed: "If that view be sound, the next question is, what is the form of procedure which should be adopted? The method adopted in the English courts, and which has now received the approval of the court of appeal, is to diminish the weekly payment to the nominal sum of 1d. With great respect, I cannot think that that is a course which should be followed. It seems to me to proceed upon the view that the arbiter must either end, diminish, or increase the weekly payment. I have already given my reasons for thinking that the arbiter is not so restricted; but assuming that he is, the awarding of a nominal sum seems to me to be indefensible, because it is a device whereby it is attempted to keep the letter of the law while disregarding the substance. The course which I venture to suggest should be followed in this and similar cases is something of this nature: the arbiter might find that in respect the medical referee had reported that the respondent was not incapacitated for work but was able for his ordinary work, he was not entitled to receive any weekly payment so long as he remained in that condition, and with that finding he might sist procedure or continue the cause, with leave to either party to renew the application in the event of a change of circumstances occurring. Of course I merely suggest the kind of order (and not the precise terms of it) which I think would best meet the necessity of the case. It may be objected that such a course would interfere with the employer's right to redeem. No doubt it would postpone the exercise of that right, and I recognize the force of the objection. But it seems to me that there is no course which is not open to some objection. If the weekly payment were ended, then, although the workman is permanently injured and may any day become totally incapacitated, he would lose his right to compensation in the event of incapacity actually recurring, a result which in my opinion would be contrary to the statute. On the other hand, if it were held that the arbiter is bound at once to fix the amount of compensation, he can do no more than make a rough estimate, which as events turned out might be a great deal too much or a great deal too little. I therefore think that in a case such as the present,—where you have a workman

appeal.<sup>22</sup> In the House of Lords the question was at first expressly reserved;<sup>23</sup> but in a subsequent case the position was taken by all of the law lords delivering separate judgments that the county court judge or arbitrator has jurisdiction, in a case where upon the evidence he is of the opinion that incapacity may probably recur, to keep alive the liability of the employers either by a suspensory order, or by an order to reduce the weekly payment to a nominal sum, or by some other device.<sup>24</sup> Even after the decision of the House of Lords

that the practice of awarding a penny a week might be sustained, the Scottish court held that such a proceeding was a mere subterfuge and that the same end might be obtained by merely making a suspensory award.<sup>25</sup>

In cases in which the workman has recovered his capacity for work, but the injury was of such a character that incapacity might recur in the future, all of the courts now recognize the practice of making some form of suspensory award, either by awarding a penny a week or by making a declaration of lia-

permanently injured but able in the meantime to do his work,—the course which is fairest to both parties and most in consonance with the scheme of the statute is of the kind which I have indicated. I do not think that the employer can complain if he is relieved of all payments so long as the workman is able for his ordinary work, while the workman gets all that he is entitled to if he can come back to the arbiter in the event of incapacity supervening."

*Freeland v. Macfarlane, Land & Co.* (1900) 2 Sc. Sess. Cas. 5th series (Scot.) 832, and *Ferrier v. Gourley Bros. & Co.* (1902) 4 Sc. Sess. Cas. 5th series, 711, 39 Scot. L. R. 453, 9 Scot. L. T. 517, were reconsidered in *Clelland v. Singer Mfg. Co.* (Scot.) supra.

<sup>22</sup> *The Tynron v. Morgan* [1909] 2 K. B. (Eng.) 66. *Fletcher, Moulton, L. J.*, said: "It [the power of review] must not, however, be allowed to work injustice to the workman, and I will put a case which I think shows conclusively that, where there is a permanent injury, no judge is entitled to treat the fact that a man can at the moment earn just as much as he could before his accident as being a justification for terminating the compensation. Suppose there is an injury which produces incapacity only in the winter; in other words, suppose that in the summer, when the weather is fairly warm, the man can work as well as he could previously to the accident, but in the cold weather he is wholly or partially incapacitated, and that the owners apply in the summer for a review. They are perfectly entitled to have the compensation cut down to a nominal amount at the time, but they are not entitled to have the compensation terminated, because, if once terminated, it cannot be reviewed again. If we were to hold that the fact that the man was earning full wages at the moment of review was sufficient to entitle the compensation to be terminated, the consequence would be that the county court judge, with full knowledge of the admitted fact that when the winter came on the man would develop an incapacity due to the accident, would be obliged to stop all compensation for the future. The tribunals which have to administer this act have got out of the difficulty by grant-

ing an award for nominal compensation so long as the immediate earning powers are not diminished, when there is reason to believe that they are not permanently as great as they were before the accident. This court has again and again had to deal with such awards, and has treated them as valid, and I think that they are in the interest of both parties."

Where there is some reason to anticipate any recurrence of the difficulty, the county judge should make a suspensory award of a nominal amount, in order to keep alive the employer's liability. *Griga v. The Harelda* (1910) 3 B. W. C. C. (Eng.) 116, *Cozens-Hardy, M. R.*, observed: "In my opinion this court has distinctly laid down a principle from which we should not depart, that in a case of this kind, where a man has been ruptured, though by wearing a truss he may be physically able to earn full wages, still the circumstances are such that there is a possibility, if not a probability, that in the future there will be bad effects resulting from the accident which will effect his earning capacity."

<sup>23</sup> *Nicholson v. Piper* [1907] A. C. (Eng.) 215, 76 L. J. K. B. N. S. 856, 97 L. T. N. S. 119, 23 Times L. R. 620.

<sup>24</sup> *Taylor v. London & N. W. R. Co.* [1912] A. C. (Eng.) 242, 81 L. J. K. B. N. S. 541, 106 L. T. N. S. 354, 28 Times L. R. 290, 56 Sol. Jo. 323, [1912] W. C. C. 95, [1912] W. N. 53, 49 Scot. L. R. 1020, 5 B. W. C. C. 218.

In *Weir v. North British R. Co.* (1912) 49 Scot. L. R. 772, [1912] S. C. 1073, 5 B. W. C. C. 595, weekly payments were terminated by the sheriff substitute, but as this decision was rendered prior to the decision of the House of Lords in *Taylor v. London & N. W. R. Co.* (Eng.) supra, as to open awards, the court of sessions sent the case back to be reconsidered in the light of that case.

<sup>25</sup> *Dempsey v. Caldwell* [1914] S. C. 28, 51 Scot. L. R. 16, [1913] 2 Scot. L. T. 367, 7 B. W. C. C. 823. In this case the workman had sustained permanent injuries to his right hand; and the court of sessions remitted the case to the sheriff substitute who had previously terminated the payment, to consider whether the ending of the payment of compensation should be permanent or temporary.



bility, thus keeping the matter open for future determination. The question whether the case is one to be thus kept open depends upon the facts of each case.<sup>26</sup> It is not a case for suspensory award where the workman has been found to be wholly recovered from the accident.<sup>27</sup>

The county court judge may make a suspensory award upon an original application as well as under an application to review.<sup>28</sup> The mere fact that a minor is earning the same or more after the injury than before, does not

warrant the county court judge in terminating the weekly payments.<sup>29</sup> But the arbiter cannot increase weekly payments beyond the 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, although the workman was a minor whose earning capacity had increased beyond what it was at the time of the award.<sup>30</sup> In determining what weekly sum the workman, under age, would probably have been earning at the date of the review had he remained uninjured, the

<sup>26</sup> The county court judge is not justified in granting merely a suspensory award of 1 penny a week where, but three days before the application, there had been a second amputation of part of the finger which had been crushed. *Burgess v. Jewell* (1911) 4 B. W. C. C. (Eng.) 145.

On the application by the employers to terminate the payment of a penny a week, the question for the county court judge is, Is the workman in such a position that in the open market his earning capacity in the future may be less than it was before the accident, as a result of the accident? The question is not whether the employers are paying him the same wages as he received before the accident. *Birmingham Cabinet Mfg. Co. v. Dudley* (1910) 102 L. T. N. S. (Eng.) 619, 3 B. W. C. C. 169.

Where the workman's inability to earn as much or more than before the accident is due to his drinking habits, he is entitled to no more than an award of a penny a week. *Hill v. Ocean Coal Co.* (1909) 3 B. W. C. C. (Eng.) 29.

The question whether a workman who has lost a finger and received permanent injury to two other fingers is entitled to a suspensory award is a question of fact for the county court judge, and his decision that the workman is not so entitled will not be disturbed, although medical evidence was given to the effect that the lad would always be handicapped and would never be able to grip firmly with that hand, and a foreman called on behalf of the employers said that although he thought the lad was now able to work just as well as before the accident, still he would engage a man whose hand was not injured in preference to one who had lost one or more fingers. *Emmerson v. Donkin* (1910) 4 B. W. C. C. (Eng.) 74.

Where the workman has lost the sight of one eye by accident and subsequently regained his earning capacity, upon an application to terminate payment the workman is entitled to a declaration of liability, where there is possible loss of the other eye from suppuration from the injured eye, although it is possible that this could be avoided by having the dead eye removed. *Braithwaite v. Cox* (1911) 5 B. W. C. C. (Eng.) 77. *Cozens-Hardy, M. R.*, said: "A man cannot be compelled to put himself L.R.A.1916A.

in a worse earning position, as this man would if he were to have his dead eye removed. He would be a palpable one-eyed man if he underwent this operation."

Where the employers offered to receive a workman back, and he admitted he was then able to do all his old work, he is not entitled to such a declaration of the liability of his former employers as would preserve his rights in the event of supervening incapacity. *Husband v. Campbell* (1903) 5 Sc. Sess. Cas. 5th series, 1146, 40 Scot. L. R. 822, 11 Scot. L. T. 243.

It is the duty of the county court judge to make a declaration of liability, and not to terminate the payment of compensation whenever there exists a permanent injury which may in the future develop and lessen the earning power. *Chapman v. Sage & Co.* (1915) 8 B. W. C. C. (Eng.) 559.

<sup>27</sup> *London & N. W. R. Co. v. Taylor* (1910) 4 B. W. C. C. (Eng.) 11; *Cranfield v. Ansell* (1910) 4 B. W. C. C. (Eng.) 57.

Where the incapacity has ceased, and the injury to his finger has not prevented the workman from obtaining work, it is not a case for a suspensory award. *Goodall v. Kramer* (1910) 3 B. W. C. C. (Eng.) 315.

It is competent for the arbitrator to terminate the compensation and not give a suspensory award, where the workman has recovered his capacity for work, and the injury is of such a character as not to impair his chance for work in his former line of employment, or in any other line which he might reasonably hope to follow. *Watson v. Beardmore* [1914] S. C. 718, [1914] 2 Scot. L. T. 481, 51 Scot. L. R. 621, 7 B. W. C. C. 913.

<sup>28</sup> *Green v. Cammell* [1913] 3 K. B. (Eng.) 665, 82 L. J. K. B. N. S. 1230, 109 L. T. N. S. 202, 29 Times L. R. 703, [1913] W. N. 259, 6 B. W. C. C. 735.

<sup>29</sup> *Wilson v. Jackson's Stores* (1905) 7 W. C. C. (Eng.) 122.

The fact that a minor workman is earning the same wages as before the accident is not in itself conclusive as to the termination of his right to compensation. *Malcolm v. Bowhill Coal Co.* [1909-10] S. C. 447, 47 Scot. L. R. 449, 3 B. W. C. C. 562.

<sup>30</sup> *Ambridge v. Good* (1912) 5 B. W. C. C. (Eng.) 691.

primary proposition to be dealt with is what would have been his general earning capacity, not what would have been his earning capacity in the particular employment in which he then was.<sup>31</sup> Where a work girl, seventeen years of age, who had injured her left hand, which resulted in the loss of the whole of her first and part of her second finger, had fully recovered so far as the nature of the injury allowed, and was offered light work by her employer at a wage considerably in advance of that which she was receiving at the time of her injury, the county court judge was not justified in continuing an award of compensation which in no way purported to be founded on the probable increase of her earnings under the proviso in schedule I. (16).<sup>32</sup>

Upon an application to review, the onus of proving that the workman's present condition justifies a change in the

award is upon the person seeking such change.<sup>33</sup> Whenever the employer wishes to have the compensation ended or diminished, the burden is upon him to show a change of circumstances justifying it; but when the employer meets this burden by a certificate of the medical referee, then the burden is upon the workman to show that any supervening incapacity is due to the accident.<sup>34</sup>

The county court judge or other arbitrator is bound by the pleading and cannot give relief other than is asked for in the application for review or in the answer;<sup>35</sup> but an order to terminate the payments may be made although the application was to reduce the payments, where a further request to terminate was lodged during the proceedings.<sup>36</sup>

Findings of fact of the arbitrator upon a review will not be disturbed if there is any evidence to sustain them.<sup>37</sup>

The county court judge should state

<sup>31</sup> *Vickers v. Evans* [1910] A. C. (Eng.) 444, 79 L. J. K. B. N. S. 954, 103 L. T. N. S. 292, 26 Times L. R. 548, 54 Sol. Jo. 651, 3 B. W. C. C. 403.

The question to be determined is, what as a matter of fact is the sum which the minor workman would have been earning at the particular date had he not been injured. *Malcolm v. Spowart* [1913] W. C. & Ins. Rep. 523, 50 Scot. L. R. 823, 6 B. W. C. C. 856.

<sup>32</sup> *Clarke v. Knox* (1913) 6 B. W. C. C. (Eng.) 695, 57 Sol. Jo. 793.

<sup>33</sup> *Gray v. Reed* [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43.

The burden is upon the employer to show such change of circumstances as to warrant the termination of the weekly payments. *Cory v. Hughes* [1911] 2 K. B. (Eng.) 738, 80 L. J. K. B. N. S. 1307, 105 L. T. N. S. 274, 27 Times L. R. 498, 4 B. W. C. C. 291; *New Monekton Collieries v. Toone* [1913] W. C. & Ins. Rep. (Eng.) 425, 109 L. T. N. S. 374, 57 Sol. Jo. 753, 6 B. W. C. C. 660.

In the case of a payment fixed by a recorded memorandum of agreement, the burden is on the employer to prove affirmatively that the workman had recovered from his injuries. *Quinn v. McCallum* [1909] S. C. 227, 46 Scot. L. R. 141.

<sup>34</sup> *McGhee v. Summerlee Iron Co.* [1911] S. C. 870, 48 Scot. L. R. 807, 4 B. W. C. C. 424.

<sup>35</sup> A county court judge, who has been asked by the workman for the restoration of a weekly payment, is not entitled upon such application to terminate the employers' liability where the employers have not asked for such termination in their answer. *Henshaw v. Fielding* (1914) 7 B. W. C. C. (Eng.) 650.

<sup>36</sup> Where the application is for the reduction of compensation the county court judge L.R.A.1916A.

is justified in terminating it, 'where' the whole of the applicant's evidence is directed towards making a case for terminating the payments, and the workman's medical evidence that the workman is not fit for continuous work is directed to and traverses that issue, and a further request for termination is lodged during the proceedings. *Higgs v. Unicum* [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. N. S. 369, 108 L. T. N. S. 169, [1913] W. N. 36, [1913] W. C. & Ins. Rep. 263, 6 B. W. C. C. 205.

<sup>37</sup> *McNaughton v. Cunningham* [1910] S. C. 980, 47 Scot. L. R. 781, 3 B. W. C. C. 576, 577; *Anderson v. Darnagill Coal Co.* [1910] S. C. 456, 47 Scot. L. R. 342; *Edmondsons v. Parker* (1911) 107 L. T. N. S. (Eng.) 339, 5 B. W. C. C. 70; *Jones v. Tirdonkin Colliery Co.* (1911) 5 B. W. C. C. (Eng.) 3; *Westcott & L. Lines v. Price* [1912] W. C. Rep. (Eng.) 280, 5 B. W. C. C. 430; *Giardelli v. London Welch S. S. Co.* (1914) 7 B. W. C. C. (Eng.) 550.

The reduction of the weekly compensation, due to a change of circumstances, does not present a question of law reviewable by the court of appeal. *Taff Vale R. Co. v. Lane* (1910) 3 B. W. C. C. (Eng.) 297.

Where there is evidence to support the findings of the county court judge as to the condition of the workman the court will not interfere, although it may well be that if the county court judge had taken the opposite view the court could not possibly have interfered with his finding. *Waal v. Steel* (1915) 112 L. T. N. S. (Eng.) 846.

The decision of the arbitrator that a workman who had lost the sight of one eye by an accident had recovered from his incapacity and was fit for work will not be disturbed, where there was evidence tending to support the finding and it was also in evidence that the applicant had been employed since the accident at his



the grounds upon which he arrived at his findings.<sup>38</sup>

Several other decisions on this section of schedule I. but involving no general principle will be found discussed in the note below.<sup>39</sup>

As to the effect of refusal to have an operation performed upon the right of review, see notes 26 et seq. ante, 139.

#### *k. Payment of lump sum (§ 17).*

There does not exist anywhere in the act, except in schedule I. § 17, any right to award a lump sum.<sup>40</sup> Under this paragraph the employer's right to redeem is absolute;<sup>41</sup> and the registrar is liable in damages to the employer for failure to record a memorandum of agreement as to a lump sum, where it is signed by the agent for the employer, although

former work at the old rate of wages. *Jones v. Anderson* (1914) 84 L. J. P. C. N. S. (Eng.) 47, 112 L. T. N. S. 225, 31 Times L. R. 76, [1914] W. N. 432, 59 Sol. Jo. 159, [1915] W. C. & Ins. Rep. 151, 8 B. W. C. C. 2.

The county court judge was justified in increasing from a nominal amount the compensation of a man who had lost an eye by accident, and consequently could not do his work properly and was reduced to the status of a casual laborer. *Brown v. Thornycroft* (1912) 5 B. W. C. C. (Eng.) 386.

<sup>38</sup> *Jones v. Tirdonkin Colliery Co.* (1911) 5 B. W. C. C. (Eng.) 3.

<sup>39</sup> In an application by an employer for review and ending of a weekly payment made under agreement, because the workman had recovered and had been certified as recovered by a medical practitioner selected by the employer, the sheriff substitute was not entitled to refuse the allowance of proof that the workman had not recovered. *Johnstone v. Cochran* (1904) 6 Sc. Sess. Cas. 5th series, 854, 41 Scot. L. R. 644, 12 Scot. L. T. 175.

Where the workman made a definite claim and the employer admitted his liability but claimed that the workman had recovered his earning capacity upon a fixed date and asked the court to terminate the workman's right to compensation, the proper procedure was for the sheriff substitute not to grant a decerniture for the admitted liability and to hold that there was no dispute to be submitted to arbitration, but to make a finding that the workman was entitled to compensation to the amount of the admitted liability, and then to take up the question whether the compensation was to be ended or not at the date fixed by the employer. The fact that the workman made no claim for compensation beyond the date mentioned was not the equivalent of a finding that his right to compensation had terminated. *Bowhill Coal Co. v. Malcolm* L.R.A.1916A.

form 53, which by rule 56a (4) must accompany such payment, requires that it shall be signed by the employers or their solicitors.<sup>42</sup>

The arbitrator in making an award of a lump sum has no power to make an optional award,<sup>43</sup> and he has no jurisdiction over an application for the reduction of liability for weekly payments by the payment of a lump sum, where the applicant limits the lump sum to a certain amount.<sup>44</sup>

There is no provision in the act for the review of an award of a lump sum in redemption of the weekly payment, since § 16 applies to the review of weekly payments only.<sup>45</sup>

Unless the county court judge is satisfied that the incapacity of the workman is permanent, he is not, in awarding a

(1909) S. C. 426, 46 Scot. L. R. 354, 2 B. W. C. C. 131.

The county court judge was justified in finding that a workman was still entitled to compensation, where the workman was suffering from nystagmus and the county court judge found that his susceptibility to nystagmus was increased. *Garnant Anthracite Collieries v. Rees* [1912] 3 K. B. (Eng.) 372, 81 L. J. K. B. N. S. 1189, 107 L. T. N. S. 279, 5 B. W. C. C. 694.

<sup>40</sup> *Mulholland v. Whitehaven Colliery Co.* [1910] 2 K. B. (Eng.) 278, 79 L. J. K. B. N. S. 987, 26 Times L. R. 462, 102 L. T. N. S. 663, 3 B. W. C. C. 317.

<sup>41</sup> In *Kendall v. Pennington* (1912) 106 L. T. N. S. (Eng.) 817, [1912] W. C. Rep. 144, 5 B. W. C. C. 335, the court held that, as the employer's right to redeem is absolute, the county court judge is not justified in refusing the employer's application to redeem upon the ground that it would not be for the benefit of the workman to have so large a sum paid to him at once, and that provision is made in clause 17 for investing the sum for the benefit of the workman in such a case.

<sup>42</sup> *Thompson v. Ferraro* (1913) 57 Sol. Jo. (Eng.) 479, 6 B. W. C. C. 461.

<sup>43</sup> *Calico Printers' Asso. v. Booth* [1913] 3 K. B. (Eng.) 652, 82 L. J. K. B. N. S. 985, [1913] W. C. & Ins. Rep. 540, 109 L. T. N. S. 123, 6 B. W. C. C. 551. In this case the judge made an award that a weekly payment "may be redeemed."

<sup>44</sup> *Castle Spinning Co. v. Atkinson* [1905] 1 K. B. (Eng.) 336, 74 L. J. K. B. N. S. 265, 53 Week. Rep. 360, 92 L. T. N. S. 147, 21 Times L. R. 192.

<sup>45</sup> *Marshall v. Prince* [1914] 3 K. B. (Eng.) 1047, 30 Times L. R. 654, 137 L. T. Jo. 316, 58 Sol. Jo. 721, 7 B. W. C. C. 755. The applicant in this case was an infant and the court of appeal held that he was in no better position than an adult so far as procuring a review of an award of a lump sum was concerned.

lump sum, to be guided by the principle laid down in ¶ 17 of the first schedule.<sup>46</sup>

In a Scotch case it was held that a workman who had lost an arm was permanently incapacitated within the meaning of ¶ 17.<sup>47</sup> But it has been pointed out that because some physical injury is permanent, it does not follow that the incapacity is permanent.<sup>48</sup> In this point of view the amount of the lump sum paid

is a question of fact, dependent upon the particular circumstances of each case.<sup>49</sup>

In an application for the redemption of weekly payments the amount which the employer has already paid is irrelevant.<sup>50</sup>

In the note below will be found some cases dealing with questions of practice under this paragraph.<sup>51</sup>

<sup>46</sup> *Swannick v. Congested Dist. Board* [1913] W. C. & Ins. Rep. 96, 46 Ir. Law Times, 253, 6 B. W. C. C. 449.

<sup>47</sup> *National Teleph. Co. v. Smith* [1909] S. C. 1363, 46 Scot. L. R. 988.

<sup>48</sup> In fixing the lump sum by which the weekly payments of an injured employee may be redeemed, the county court judge must direct his mind to the question whether the payments may be increased or diminished in the future; the fact that the physical injury is permanent is not conclusive on the question whether the incapacity is permanent. *Calico Printers' Asso. v. Higham* [1912] 1 K. B. (Eng.) 93, [1911] W. N. 221, 28 Times L. R. 53, 56 Sol. Jo. 89.

*Cozens-Hardy, M. R.*, disagreed with the conclusion of Lord Dundas and Lord Ardwell in *National Teleph. Co. v. Smith* [1909] S. C. 1363, 46 Scot. L. R. 988, 2 B. W. C. C. 417, that where a man was in receipt of half wages in consequence of total incapacity the 75 per cent rule must be applied, and that no preliminary inquiry was necessary to determine whether the incapacity was permanent.

<sup>49</sup> In *Staveley Coal & I. Co. v. Elson* [1912] W. C. Rep. (Eng.) 228, 5 B. W. C. C. 301, the court of appeal held that the county court judge misdirected himself when he awarded as a lump sum the actuarial value of the average weekly payments. The county court judge followed *National Teleph. Co. v. Smith* (Scot.), but, as it was pointed out by the court of appeal, that case had been dissented from in *Calico Printers' Asso. v. Higham* (Eng.) supra.

In *Pattinson v. Stevenson* (1900; C. C.) 109 L. T. Jo. (Eng.) 106, 2 W. C. C. 156, where the parties had agreed upon the actuarial value of the weekly payment for the life of the workman, the county court judge determined that that value was subject to deduction on the contingency of his condition improving and in respect to his dying at an earlier age than the average human life. This decision was subsequently affirmed by the court of appeal on June 30, 1900.

In *Grant v. Conroy* (1904; C. C.) 6 W. C. C. (Eng.) 153, a lump sum of £250 was awarded a man forty years of age, both of whose hands had been severely and probably permanently injured, who had been receiving one pound a week as compensation.

<sup>50</sup> In *Victor Mills v. Shakleton* [1912] 1 K. B. (Eng.) 22 [1911] W. N. 197, 81 L. J. K. B. N. S. 34, 105 L. T. N. S. 613, it L.R.A.1916A.

was held that under § 13 of the first schedule (act of 1897) it was error for the county court judge, in fixing the lump sum, to estimate the damages which the workman would have been awarded at the time of the accident, and deduct therefrom the payments received by him, and to award the balance; all the county court judge has to do in such a case is to assess the redemption price of the weekly payments payable under the award. *Cozens-Hardy, M. R.*, took the view that such sums were recoverable in a separate action.

*Victor Mills v. Shakleton* (Eng.) was followed by *Dutka v. Bankhead Mines* (1915) 23 D. L. R. (Alberta) 273.

<sup>51</sup> It was error for the county court judge to direct the employer to pay the cost, where the workman had agreed to accept a lump sum in discharge of the employer's liability and the matter only came before the court because the registrar was dissatisfied as to the amount of the commutation, which amount, however, was held to be satisfactory by the judge. *Kierson v. Thompson* [1913] 1 K. B. (Eng.) 587, 82 L. J. K. B. N. S. 920, 108 L. T. N. S. 237, 29 Times L. R. 205, 57 Sol. Jo. 226, [1913] W. N. 12, [1913] W. C. & Ins. Rep. 140, 6 B. W. C. C. 60.

Where the county court judge denied the application of the workman to review and increase the amount of compensation, and the judge immediately by the consent of the parties took up the application of the employers for payment of a lump sum and made an award, the order of the county court judge denying a review cannot be appealed from, since the application to redeem was by consent, although the payments had continued for about four months only. *Howell v. Blackwell* [1912] W. C. Rep. (Eng.) 186, 5 B. W. C. C. 293.

On an application by the employers under schedule I. (17) to redeem weekly payment, the judge properly excluded his own personal knowledge gained from other sources. *Calico Printers' Asso. v. Booth* 29 Times L. R. 664, 57 Sol. Jo. 662, [1913] 3 K. B. (Eng.) 652, 82 L. J. K. B. N. S. 985, 6 B. W. C. C. 556.

Where an employer, who was paying compensation, applied for a diminution or redemption of a weekly payment, he was entitled, after the workman had answered and objected to it and before the matter came on for jury, to withdraw the application so far as it related to the question of redemption. *Gotobed v. Petchell* [1914] 2 K. B. (Eng.) 36, 83 L. J. K. B. N. S.



*1. Set-offs against weekly payments*  
(¶ 19).

The purpose of the act is to give to the workman for his subsistence the full amount of the weekly payments.<sup>52</sup> Money paid in weekly payments in excess of what is legally required to be paid cannot be offset against future payments.<sup>53</sup>

An allowance of coal given by custom to all miners when incapacitated is not to be regarded as compensation, this being his due under his contract of employment.<sup>54</sup> But the employer may, under an agreement with the workman, deduct the amount of weekly rent which the workman as the employer's tenant owed him, from the amount of the weekly payment.<sup>55</sup>

*XXI. Arbitration (sched. II.).*

*a. Text of schedule II.*

Second Schedule. Arbitration, etc. (1) For the purpose of settling any matter which under this act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so

refers the matter, or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or, in the absence of agreement, by the judge of the county court, according to the procedure prescribed by rules of court.

(3) In England the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorizes, be settled, according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this act, have all the powers of that judge.

(4) The arbitration act of 1889 shall not apply to any arbitration under this act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this act, or where he gives any decision or makes any order under this act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the supreme court either party appeals to the court of appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court.

(5) A judge of county courts may, if

429, 110 L. T. N. S. 453, 30 Times L. R. 253, 58 Sol. Jo. 249, [1914] W. N. 33, [1914] W. C. & Ins. Rep. 115, 7 B. W. C. C. 109.

An agreement for the redemption of the weekly payment by a lump sum should be registered by the registrar upon the application of either party, although the agreement has been executed, the money having been paid. *Rex v. Thetford County Ct. Registrar* (1915; Div. Ct.) [1915] 1 K. B. (Eng.) 224, 112 L. T. N. S. 413, 84 L. J. K. B. N. S. 291, [1915] W. C. & Ins. Rep. 136, [1914] W. N. 438, 8 B. W. C. C. 276.

<sup>52</sup> An employer who has been found liable in a weekly payment under the act to a workman cannot set off against that payment a sum awarded to him as expenses, against the workman, in an application for the diminution of the weekly payment. *Rosewell Gas Coal Co. v. MPVicar* (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 290. The Lord Justice Clerk said: "The object of the act is to secure that an injured workman shall have for his subsistence the sum awarded to him, and that is not to be trenched upon in any way."

<sup>53</sup> *Muller v. Batavier Line* (1909; C. C.) 126 L. T. Jo. (Eng.) 96, 2 B. W. C. C. 495. L.R.A.1916A.

The employer is not entitled to set off against a period during which he had paid no compensation the amount which he had paid for a previous period in excess of what was due to the workman as compensation. *Doyle v. Cork Steam Packet Co.* [1912] W. C. Rep. (Eng.) 203, 5 B. W. C. C. 350.

Where by order of the county court judge the amount of compensation has been duly reduced as of a prior date, the employer is not entitled to treat the excess which he paid between the time when the reduction was to take place and the date when the order was made as payments pro tanto in advance of the reduced payments. *Hosegood v. Wilson* [1911] 1 K. B. (Eng.) 30, 80 L. J. K. B. N. S. 519, 103 L. T. N. S. 616, 27 Times L. R. 88, 4 B. W. C. C. 30, [1910] W. N. 242.

<sup>54</sup> *Simmonds v. Stourbridge Brick & Fire Clay Co.* [1910] 2 K. B. (Eng.) 269, 79 L. J. K. B. N. S. 997, 102 L. T. N. S. 732, 26 Times L. R. 430.

<sup>55</sup> *Brown v. South Eastern & C. R. Co.* (1910) 3 B. W. C. C. (Eng.) 428.

he thinks fit, summon a medical referee to sit with him as an assessor.

(6) Rules of court may make provision for the appearance, in any arbitration under this act, of any party by some other person.

(7) The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court, subject as respects such judge and an arbitrator appointed by him to rules of court. The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules, and such taxation may be reviewed by the judge of the county court.

(8) In the case of the death, or refusal or inability to act, of an arbitrator, the judge of the county court may, on the application of any party, appoint a new arbitrator.

(9) Where the amount of compensation under this act has been ascertained, or any weekly payment varied, or any other matter decided under this act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment. Provided that—(a) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and—

(b) Where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this act, and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; and—

(c) The judge of the county court may at any time rectify the register; and—

(d) Where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a L.R.A.1916A.

weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge, who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; and—

(e) The judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just.

(10) An agreement as to the redemption of a weekly payment by a lump sum, if not registered in accordance with this act, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability, or to dependents, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation, unless, in either case, he proves that the failure to register was not due to any neglect or default on his part.

(11) Where any matter under this act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or, if they reside in different districts, the district prescribed by rules of court without



prejudice to any transfer in manner provided by rules of court.

(12) The duty of a judge of county courts under this act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this act authorized rules of court to be made, and also generally for carrying into effect this act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under § 164 of the county courts act 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(13) No court fee, except such as may be prescribed under ¶ (15) of the first schedule to this act, shall be payable by any party in respect of any proceedings by or against a workman under this act in the court prior to the award.

(14) Any sum awarded as compensation shall, unless paid into court under this act, be paid on the receipt of the person to whom it is payable under any agreement or award, and the solicitor or agent of a person claiming compensation under this act shall not be entitled to recover from him any costs in respect of any proceedings in an arbitration under this act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the committee, the arbitrator or the judge of the county court, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(15) Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee or report any matter which seems material to any question arising in the arbitration.

(16) The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he L.R.A.1916A.

may think fit, confer on any committee representative of an employer and his workmen, as respects any matter in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be paid in cases where, but for the order, the money would be required to be paid into court, and the order may exclude from the operation of provisos (d) and (e) of ¶ (9) of this schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential, or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order.

(17) In the application of this schedule to Scotland—(a) "County court judgment" as used in ¶ (9) of this schedule, means a recorded decree arbitral;

(b) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by § 52 of the sheriff courts (Scotland) act 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the court of session, who may hear and determine the same, and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such divisions to the House of Lords;

(c) Paragraphs (3), (4), and (8) shall not apply.

(18) In the application of this schedule to Ireland the expression "judge of the county court" shall include the recorder of any city or town, and an appeal shall lie from the court of appeal to the House of Lords.

[It has not been deemed necessary to give any of the text of the second schedule of the original act; but it may be noted that, for the most part, the later act follows along the lines of the earlier one.]

*b. Construction of these provisions.*

*1. Functions of committee's representative of the employer and his workmen.*

The appointment of a committee representative of the employer and his workmen, such as is spoken of in schedule II. ¶ 1, and an award made by it, do not constitute a contracting out of the act, nor a scheme which must be certified under § 3 of the act. This procedure is a part of the machinery provided for the purpose of giving effect to the act.<sup>56</sup> If there is such a committee and its jurisdiction is not excluded as provided for in that paragraph, namely, by either party objecting in writing before the committee meets to consider the matter, such committee has full jurisdiction to the exclusion of the county court and everybody else, unless the committee refers the matter to arbitration, or fails to settle it within six months from the date of the claim.<sup>57</sup> Although the award may be made by such a committee, an application for review is to be made to the county court judge.<sup>58</sup>

*2. Powers and functions of arbitrators.*

Under the second paragraph of the second schedule, the county court judge,

sitting as an arbitrator, has only the power of arbitrator.<sup>59</sup> Arbitration under the act is not controlled by the general arbitration act, and the powers of the arbitrator are not the same as those of an arbitrator appointed under that act; his powers are defined by the compensation act itself.<sup>60</sup> He has no power to order interrogatories to be taken;<sup>61</sup> nor to delegate to another the duty of taking evidence;<sup>62</sup> nor to grant a new trial.<sup>63</sup>

The power of the arbitrator does not go beyond determining the liability to pay compensation and the amount thereof.<sup>64</sup> But he is acting within his jurisdiction in determining the question whether an applicant signed the discharge under the mistaken belief that it was merely a receipt for past compensation, since this is the question "as to the liability to pay compensation," within subsec. 3 of § 1 of the act.<sup>65</sup> Neither the registrar nor the county court judge qua judge can deal with the question of incapacity, since that is the duty of the arbitrator.<sup>66</sup>

Different rules prevail under some of the colonial acts: Thus, a judge of the district court, acting as arbitrator under the Alberta act, has power to direct the issue of a commission to take the evidence of witnesses in order that the

<sup>56</sup> *Mulholland v. Whitehaven Colliery Co.* [1910] 2 K. B. (Eng.) 278, 79 L. J. K. B. N. S. 987, 26 Times L. R. 462, 102 L. T. N. S. 663, 3 B. W. C. C. 317.

<sup>57</sup> (Eng.) *Ibid.*

<sup>58</sup> In *Rex v. Templer* [1912] 1 K. B. (Eng.) 351, 81 L. J. K. B. N. S. 399, 105 L. T. N. S. 905, 28 Times L. R. 146, 132 L. T. Jo. 203, 5 B. W. C. C. 242, the divisional court held that the county court judge had jurisdiction to entertain an application to review weekly payments, being made under an award by a committee representing the employers and workmen, which award presumed that the workman could perform "light labor" which was furnished by the employer, but which the applicant found himself unable to perform. This was affirmed by the court of appeal in [1912] 2 K. B. 444, 81 L. J. K. B. N. S. 805, [1912] W. C. Rep. 209, 5 B. W. C. C. 454, 106 L. T. N. S. 855, [1912] W. N. 135, 28 Times L. R. 410, 56 Sol. Jo. 501.

<sup>59</sup> *Mountain v. Parr* [1899] 1 Q. B. (Eng.) 805, 68 L. J. Q. B. N. S. 447, 47 Week. Rep. 353, 80 L. T. N. S. 342, 15 Times L. R. 262; *Sutton v. Great Northern R. Co.* [1909] 2 K. B. (Eng.) 791, 79 L. J. K. B. N. S. 81, 101 L. T. N. S. 175, 2 B. W. C. C. 428.

<sup>60</sup> *Sutton v. Great Northern R. Co.* (Eng.) *supra*.

<sup>61</sup> (Eng.) *Ibid.*

<sup>62</sup> *Taylor v. Cripps* [1914] 3 K. B. (Eng.) 989, 83 L. J. K. B. N. S. 1538, 7 B. W. C. C. 623, 30 Times L. R. 616.

L.R.A.1916A.

<sup>63</sup> *Mountain v. Parr* (Eng.) *supra*.

<sup>64</sup> An arbiter is not entitled to pronounce an order the validity of which will depend on the workman's condition at a future date. *Allen v. Spowart* (1906) 8 Sc. Sess. 5th series (Scot.) 811.

A sheriff acting as arbitrator under the workmen's compensation act may competently dismiss a claim as irrelevant, without hearing proof. *Coyne v. Glasgow Steam Coasters Co.* [1906-07] S. C. (Scot.) 112.

The sheriff as arbiter has under the act no power to enforce an agreement by decerning for arrears of compensation due under it. *Colville v. Tigue* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 179; *Malcolm v. Bowhill Coal Co.* [1909] S. C. (Scot.) 426.

<sup>65</sup> *Ellis v. Lochgelly Iron & Coal Co.* [1909] S. C. 1278, 46 Scot. L. R. 960.

Where a workman signed a receipt, the effect of which he did not understand, which receipt entitled the employers to terminate the compensation when they considered that the workman had recovered, and the employers objected to the filing of a memorandum in the ordinary form, the workman is entitled to arbitration to settle the matter in dispute. *Brown v. Hunter* [1912] S. C. 996, 49 Scot. L. R. 695, 5 B. W. C. C. 589.

<sup>66</sup> *Warren v. Roxburgh* (1912) 106 L. T. N. S. (Eng.) 555, 5 B. W. C. C. 263, [1912] W. C. Rep. 306.



evidence so taken may be used before him as part of the evidence on which to base his award.<sup>67</sup> And the British Columbia arbitration act (B. C. Rev. Stat. 1897, chap. 9) applies to an award under the workmen's compensation act 1902; and a motion to set aside the award may be made under the former act.<sup>68</sup> Under this act he had power to permit amendments to the pleadings.<sup>69</sup> But he does not have power to set aside a judgment filed in his court by the duly appointed arbitrator; this does not amount to a rectification of the register.<sup>70</sup> An arbitrator is not required to seal his award.<sup>71</sup> And he has no power to submit a question of law to the judge after he has made his award.<sup>72</sup>

### 3. Appeals.

An appeal from the decision of the county court judge upon points of law arising under the act lies to the court of appeal, and not to the divisional court.<sup>73</sup> But if the county court judge refuses to entertain jurisdiction of the case under the act, an appeal from such refusal lies

to the divisional court, and not to the court of appeal.<sup>74</sup>

Any appeal from an arbitrator appointed under schedule II. ¶¶ 2 or 3, lies to the county court judge, and not to the court of appeal.<sup>75</sup> An appeal lies to the county court judge *qua* judge, from an order of the registrar, granting leave to issue execution in a case where there was an agreement to pay compensation during total incapacity, and the employer claimed that the incapacity had ceased.<sup>76</sup>

The time for appeal from an award of the arbitrator runs from the time the award was perfected.<sup>77</sup> There is no way by which a workman who has failed to appeal from a decision for an award which was to terminate at a specific time in the future can, after such time, have his case reviewed.<sup>78</sup> The time for appealing will be extended where the county court judge had not furnished the applicant with a copy of his note within the time allowed for appealing, although he had been requested to do so upon several occasions.<sup>79</sup>

The court of appeal has no jurisdiction

<sup>67</sup> *Bodner v. West Canadian Collieries* (1912) 8 D. L. R. (Alberta) 462, 22 West. L. Rep. (Can.) 765.

<sup>68</sup> *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 241 (writ of prohibition refused).

Subsection 3 of § 2 of the workmen's compensation act expressly confers upon an arbitrator jurisdiction to settle "any question as to whether the employment is one to which this act applies;" and the only way to review the arbitrator's finding thereon is by means of a case submitted under § 4 of the second schedule. *Basanta v. Canadian P. R. Co.* (1911) 16 B. C. 304.

<sup>69</sup> *Moore v. Crow's Nest Pass Coal Co.* (1910) 15 B. C. 391, 4 B. W. C. C. 451.

<sup>70</sup> *British Columbia Copper Co. v. McKittick* (1913) 18 B. C. 129, 7 B. W. C. C. 1037.

<sup>71</sup> *Re Lewis* (1913) 18 B. C. 329, 7 B. W. C. C. 1038.

<sup>72</sup> (B. C.) *Ibid.*

<sup>73</sup> An appeal from an order made by the county court judge upon a matter referred to him by the registrar under sub-paragraph d of ¶ 9 of the second schedule lies directly to the court of appeal, and not to the divisional court. *Bonney v. Hoyle* [1914] 2 K. B. (Eng.) 257, 83 L. J. K. B. N. S. 541, 110 L. T. N. S. 729, 136 L. T. Jo. 376, 30 Times L. R. 280, 58 Sol. Jo. 268, [1914] W. N. 43, 12 L. G. R. 358, 7 B. W. C. C. 168.

An appeal from an order of the county court judge, which wrongfully delegates his duty of taking evidence, lies to the court of appeal, and not to the divisional court. *Taylor v. Cripps* [1914] 3 K. B. (Eng.) 989, 83 L. J. K. B. N. S. 1538, 7 B. W. C. C. 623, 30 Times L. R. 616. L.R.A.1916A.

<sup>74</sup> From the refusal of a county court judge to entertain jurisdiction of an application to review an award made by a committee, an appeal lies to the divisional court, and not to the court of appeal. *Howarth v. Samuelson* (1906) 104 L. T. N. S. (Eng.) 907, 4 B. W. C. C. 287.

In *Rex v. Templer* [1912] 1 K. B. (Eng.) 351, 81 L. J. K. B. N. S. 399, 105 L. T. N. S. 905, 28 Times L. R. 146, 132 L. T. Jo. 203, 5 B. W. C. C. 242, an appeal from the decision of the county court judge that he had no jurisdiction to review an award by a committee representing the employers and workmen was passed upon by the divisional court.

<sup>75</sup> *Gray v. Southend Corp.* [1913] W. C. & Ins. Rep. (Eng.) 393, 6 B. W. C. C. 932. The workman applied to the court of appeal to extend time for appealing from the ruling of an appointed arbitrator.

The only method of reviewing the decision of an arbitrator under § 2 of the 2d schedule is by submission of a point of law to the county judge, no appeal lying directly to the court of appeal. *Gibson v. Wormald* [1904] 2 K. B. (Eng.) 40, 73 L. J. K. B. N. S. 491, 68 J. P. 382, 52 Week. Rep. 661, 91 L. T. N. S. 7, 20 Times L. R. 452.

<sup>76</sup> *Warren v. Roxburgh* (1912) 106 L. T. N. S. (Eng.) 555, 5 B. W. C. C. 263.

<sup>77</sup> *Clayton v. Jones Sewing Mach. Co.* [1908] W. N. (Eng.) 253.

<sup>78</sup> *Evans v. Barrow Haematite Steel Co.* (1914) 7 B. W. C. C. (Eng.) 681.

<sup>79</sup> *Rogers v. Metropolitan Borough* (1913) 7 B. W. C. C. (Eng.) 10.

over questions of fact,<sup>80</sup> unless there is no evidence to sustain the finding of the arbitrator.<sup>81</sup> An appeal on the points of law, not taken in courts below, will be dismissed.<sup>82</sup> If no suspensory award is asked for at the arbitration at which the compensation is terminated, an appeal upon the ground that such an award should have been made cannot be entertained.<sup>83</sup> The court of appeal has no

jurisdiction to grant a declaration of liability where that question has not been passed upon by the county court judge.<sup>84</sup> A new trial will not be granted to the workman on the ground of surprise, where the defense was set up at the hearing and no application was there made for an adjournment.<sup>85</sup>

The limitations of the powers of the court of appeal, as defined by ¶ (4), are

<sup>80</sup> *Nelson v. Allan Bros.* [1913] W. C. & Ins. Rep. 532, 50 Scot. L. R. 820, 6 B. W. C. C. 853; *Powell v. Crow's Nest Pass Coal Co.* (1915) 23 D. L. R. (B. C.) 57.

The condition of a workman is a question of fact, and the conclusion of the arbitrator will not be disturbed. *Turner v. Bell* (1910) 4 B. W. C. C. (Eng.) 63.

An appeal will not lie to the court of appeal under ¶ (4), against the refusal of the county court judge to direct insurers to pay insurance money into the Postoffice Savings Bank, in accordance with the provisions of subs. 1 of § 5 of the act. *Leech v. Life & Health Assur. Assn.* [1901] 1 K. B. (Eng.) 707, 70 L. J. K. B. N. S. 544, 49 Week. Rep. 482, 84 L. T. N. S. 414, 17 Times L. R. 354.

And see *Rigby v. Cox* [1904] 1 K. B. (Eng.) 358, 73 L. J. K. B. N. S. 80, 68 J. P. 195, 52 Week. Rep. 195, 89 L. T. N. S. 717, 20 Times L. R. 136 (no appeal against refusal of county judge to direct a review of taxation of costs).

There is no appeal in proceedings under the Alberta act from the district court judge except on questions of law. *Cargeme v. Alberta Coal & Min. Co.* (1912) 6 D. L. R. (Alberta) 231, 22 West. L. Rep. (Can.) 68.

Under the British Columbia act, a judge of the supreme court has no jurisdiction to review the award or remit it to the arbitrator, in the absence of submission by the arbitrator of a question of law. *Cozoff v. Welch* (1914; C. C.) 7 B. W. C. C. (B. C.) 1064.

Upon the hearing of an interlocutory application by the employer for an order that the workman should give particulars as to his incapacity, the county court judge may refuse to hear the managing clerk of the solicitor on the record, although the clerk himself is an admitted solicitor. *Rogers v. Metropolitan Borough* [1914] W. N. (Eng.) 279, 58 Sol. Jo. 656, 7 B. W. C. C. 432.

The filing of the county court judge that there was no change of circumstances upon which a review could be based shall not be disturbed by the court of appeal, if there is any evidence to support it. *Northeastern Marine Engineering Co. v. Davison* [1915] W. C. & Ins. Rep. (Eng.) 65, 8 B. W. C. C. 248.

<sup>81</sup> *Wheeler v. Dawson* [1913] W. C. & Ins. Rep. (Eng.) 59, 5 B. W. C. C. 645.

The court has no jurisdiction to set aside an award on the finding of fact if there is any evidence to support such finding, how-

ever much the court may disagree with it. *Woods v. Wilson* [1915] W. N. (Eng.) 109, 84 L. J. K. B. N. S. 1067, 31 Times L. R. 273, 59 Sol. Jo. 348, 8 B. W. C. C. 288.

An award founded solely on a statement made by the deceased workman to a fellow workman as to the cause of his injury will be set aside. *Wolsey v. Pethick Bros.* (1908) 1 B. W. C. C. (Eng.) 411.

Where a medical referee found that the workman's condition was such that he was fit to return to his work, and that he had recovered from his incapacity, and the sheriff substitute found that the workman had failed to discharge the onus of proving that he had not recovered his wage-earning capacity, and ended the compensation, the question is one of fact for the arbitrator and his conclusion will not be disturbed on appeal. *Jones v. Anderson* (H. L.) [1914] W. N. (Eng.) 432, 31 Times L. R. 76, 59 Sol. Jo. 159, 84 L. J. P. C. N. S. 47, 112 L. T. N. S. 225. The Lord Chancellor observed that the reward of an arbitrator under the act would only be interfered with if it was wrong in law, or was made under such circumstances that the House of Lords was of the opinion that there was no evidence upon which the arbitrator could act.

Where an award terminating compensation is made by an arbitrator, the House of Lords will interfere only when the award is wrong in law on its face, or where, in the opinion of the House, there is no evidence upon which the arbitrator could find as he did. (Eng.) *Ibid.*

<sup>82</sup> *Payne v. Clifton* (1910) 3 B. W. C. C. (Eng.) 439.

If the county court judge committed error in allowing a medical assessor to examine a workman in his private room, such error cannot be considered on appeal, in the absence of an objection made at the time. *Smith v. Foster* [1913] W. C. & Ins. Rep. (Eng.) 420, 6 B. W. C. C. 499.

<sup>83</sup> *Mauder v. Hancock* (1914) 7 B. W. C. C. (Eng.) 648.

<sup>84</sup> *Harlock v. The Coquet* [1914] W. C. & Ins. Rep. (Eng.) 75, 7 B. W. C. C. 88.

<sup>85</sup> A workman is not entitled to a new trial upon the ground of surprise where the matter was brought up at the trial and no application was made for an adjournment, although this ground was not raised on the case as it was launched, or covered by the answer of the respondent. *Rocca v. Jones* [1914] W. C. & Ins. Rep. (Eng.) 34, 7 B. W. C. C. 101, 6 N. C. C. A. 624.



indicated by the following remark of Smith, L. J.: "In cases under this act, as in appeals generally from county courts, questions of fact are not the subject of appeal. The county court judge has found the facts and has relegated them to us, and we have to decide any question of law arising on them."<sup>86</sup> But, under the local court act of Western Australia (4 Edw. VII. No. 51), an appeal lies to the supreme court on all points, both of law and of fact, and the appeal is in substance a rehearing.<sup>87</sup>

It is the duty of the county court judge when sitting as an arbitrator to state the grounds of his decision,<sup>88</sup> and the court of appeal will remit to the county court judge, to be reheard by him, a case in which the note made by the judge does not show whether he found that the accident was in the scope of the employment, or whether there was wilful misconduct, or whether the injuries were permanent.<sup>89</sup> A new trial must be had where the arbitrator did not bring out the real facts in the case, so that the court of appeal could determine that

a proper award had been made.<sup>90</sup> The county court judge must make notes of the evidence or the case will not be considered on appeal,<sup>91</sup> and it will be sent back for a new trial.<sup>92</sup> There must be a rehearing where the county court judge makes two conflicting findings, neither of which is supported by the evidence,<sup>93</sup> and where there was an award in favor of the employer, granted upon points upon which the arbitrator refused to hear the counsel for the applicant.<sup>94</sup>

A notice of appeal from the dismissal of an application to review must state the grounds of appeal;<sup>95</sup> and where there is no point of law in the notice of appeal, the appeal will be dismissed.<sup>96</sup>

In a Scotch case decided under the act of 1897, it was held that the acts of the sheriff in respect to the recording of the agreement were ministerial acts, and therefore not appealable.<sup>97</sup> But a different rule has been laid down in the later Scotch cases,<sup>98</sup> and by the English courts.<sup>99</sup> If the arbitrator does entertain a petition to rectify a recorded agreement, he is deemed to be acting

<sup>86</sup> *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. (Eng.) 141.

<sup>87</sup> *Federal Gold Mine v. Ennor* (1910; H. C. Austr.) 13 C. L. R. (Austr.) 276.

<sup>88</sup> *Marshall v. Price* (1914) 30 Times L. R. (Eng.) 248.

The proper course for an arbiter in stating a case is for him to find not only that the deceased met his death by accident while in the employment of the defendant, but to go further and find as a fact whether or not that accident arose out of and in the course of that employment; that the deceased was guilty or not guilty of serious or wilful misconduct or serious neglect; and then allow or disallow compensation, as the case may be. *Armstrong v. St. Eugene Min. Co.* (1908) 13 B. C. 385, 1 B. W. C. C. 427.

<sup>89</sup> *Walsh v. Scanlan* (1914) 48 Ir. Law Times, 234, 8 B. W. C. C. 414.

<sup>90</sup> *Shaw v. Greenacres Spinning Co.* (1915) 8 B. W. C. C. (Eng.) 35.

<sup>91</sup> *Rayman v. Fields* (1910) 102 L. T. N. S. (Eng.) 154, 26 Times L. R. 274, 3 B. W. C. C. 119; *Wright v. Sneyd Collieries* (1915) 84 L. J. K. B. N. S. (Eng.) 1332.

<sup>92</sup> *Griffiths v. Wynnstey Collieries Co.* (1909) 2 B. W. C. C. (Eng.) 450.

There must be a new trial where the county court judge fails to make note of the evidence upon which he forms his conclusion. *Taylor v. Ward* (1914) 7 B. W. C. C. (Eng.) 441.

<sup>93</sup> *Sambrook v. New Sharlston Collieries Co.* (1914) 7 B. W. C. C. (Eng.) 728.

<sup>94</sup> Where, upon the hearing of an application for compensation, the employers relied upon three defenses, namely, that the accident did not arise out of the employment, that the workman was not suffering L.R.A 1916A.

from injury by accident, but as the result of his own neglect, and third, that notice had not been given as soon as practicable, and the deputy judge directed counsel for the workman to deal only with the question of notice in his reply, and in his award the deputy judge decided the first two points in favor of the employers, but did not decide the third question, the case was sent back for a rehearing. *Silk v. Isle of Thanet Rural Dist. Council* (1913) 6 B. W. C. C. (Eng.) 539.

<sup>95</sup> *Barton v. Scott* (1910) 4 B. W. C. C. (Eng.) 15.

<sup>96</sup> *Goff v. Airds* (1912) 5 B. W. C. C. (Eng.) 277.

<sup>97</sup> In *Binning v. Easton* [1906-07] S. C. (Scot.) 406, it was held that the granting or rejecting by a sheriff of a warrant for the recording of an agreement concerning the payment of compensation was a ministerial act, and consequently could not be appealed.

<sup>98</sup> A decision of the sheriff as to whether a memorandum of an agreement fixing the amount of compensation shall be recorded is a decision qua arbiter, not merely a ministerial act, and therefore subject to appeal. *Addie v. Coakley* [1909] S. C. 545, 46 Scot. L. R. 408, distinguishing *Binning v. Easton* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 407,—a decision under the act of 1897.

The act of the sheriff in recording a memorandum of agreement is a judicial act. *Brown v. Orr* [1909-10] S. C. (Scot.) 526.

<sup>99</sup> In *Johnston v. Mew, L. & Co.* (1907) 98 L. T. N. S. (Eng.) 517, 24 Times L. R. 175, 1 B. W. C. C. 133, the court refused to follow the decision in the *Binning Case*, and

judicially and his judgment is subject to review.<sup>1</sup>

An appeal lies under schedule 2, clause 4, of the act of 1906, from a decision of the county court judge upon the question whether an applicant was bound by the provisions of a certified scheme entered into under the act of 1897, but not recertified after the passage of the act of 1906.<sup>2</sup> If an award is made and one of the parties takes advantage of it, it cannot thereafter move to have the award set aside.<sup>3</sup> So, where an applicant has accepted payments of compensation under an award, he cannot subsequently appeal from a part of the order relating to the costs.<sup>4</sup>

A few cases involving the admission

it was held that the order of a county court judge to register an agreement was a judicial act, and therefore appealable.

The decision of the county court judge that there was an implied agreement between the parties, and his direction that a memorandum thereof be filed, is a judicial proceeding which is appealable. *Johnson v. Mew, L. & Co. (Eng.) supra.*

<sup>1</sup> *Hughes v. Thistle Chemical Co. [1906-07] S. C. (Scot.) 607.*

<sup>2</sup> *Moss v. Great Eastern R. Co. [1909] 2 K. B. (Eng.) 274, 78 L. J. K. B. N. S. 1048, 100 L. T. N. S. 747, 25 Times L. R. 466, 2 B. W. C. C. 168.*

<sup>3</sup> *Jones v. Winder [1914] W. C. & Ins. Rep. (Eng.) 38, 7 B. W. C. C. 204.* In this case the arbitrator found that incapacity had ceased, but made an award for the period of time from the day when the payments had ceased to the date when he found the incapacity to have ceased.

<sup>4</sup> *Johnson v. Newton Fire Extinguisher Co. [1913] 2 K. B. (Eng.) 111, 82 L. J. K. B. N. S. 541, 108 L. T. N. S. 360, [1913] W. N. 37, [1913] W. C. & Ins. Rep. 352, 6 B. W. C. C. 202.*

Where a workman had received compensation under an award of the county court judge which was made in accordance with an offer of the employer, and which provided that a certain sum per week should be deducted from the compensation for the costs to the employer, the workman cannot appeal upon the ground that the judge had no power to order the costs to be deducted from the compensation. *Stroewer v. Aerogen Gas Co. [1913] W. C. & Ins. Rep. (Eng.) 578, 6 B. W. C. C. 576.*

<sup>5</sup> It is error for the county court judge to admit statements made by a deceased workman to his wife as to the cause of injury from which he died, although he only admitted them for use, if necessary, in the appellate court. *Smith v. Hardman [1913] W. C. & Ins. Rep. (Eng.) 459, 6 B. W. C. C. 719.*

It is error for the county court judge to go on with a case without waiting for depositions necessary for the employers in their case from witnesses who were abroad. *L.R.A.1916A.*

and sufficiency of evidence in the proceedings before the arbitrator will be found in the note below.<sup>5</sup>

A witness giving false testimony on an arbitration is guilty of perjury, since such proceedings are judicial.<sup>6</sup>

#### 4. Costs.

See also ante, 82.

Under ¶ 7, the costs to be awarded are discretionary with the committee, arbitrator, or county court judge, subject to the rules of the court. The award of costs being discretionary, the decisions in regard thereto are naturally dependent to a great extent upon the particular facts and circumstances of each case.<sup>7</sup> Ordinarily the awarding of costs is considered as a question for the arbit-

*Jessop v. Maclay (1911) 5 B. W. C. C. (Eng.) 139.*

Statements as to the cause of the injury, made in the absence of the employer by a workman to his wife and to his doctor, are not admissible to prove an accident. *Donaghy v. Ulster Spinning Co. (1912) 46 Ir. Law Times, 33, [1912] W. C. Rep. 183, as cited in Butterworths' Dig. 1912, p. 432.*

The appellate court will not open up the closed proof and remit to the arbiter to take evidence of a witness not called at the hearing, where the court was satisfied with the case stated by the sheriff. *Miller v. North British Locomotive Co. [1909] S. C. 698, 46 Scot. L. R. 755, 2 B. W. C. C. 80.*

An appeal will not be sustained merely because the arbiter admitted evidence after he had expressed a view on the case. *Peters v. The Argol (1912) 5 B. W. C. C. (Eng.) 414.*

The county court judge cannot dismiss a workman's application for arbitration on the ground that there was not sufficient evidence of an accident, where the employer's answer did not traverse the allegations as to the accident. *Rudge v. Young (1914) 7 B. W. C. C. (Eng.) 406.*

In *Johnson v. Oceanic Steam Nav. Co. [1912] W. C. Rep. (Eng.) 162, 5 B. W. C. C. 322*, the court of appeal refused to pass upon the question whether the reports which the employer had concerning the accident, furnished to the employer by the physician, were privileged.

Error in the admission of evidence will not require a new trial, where there is sufficient competent evidence to support the judge's finding. *Beare v. Garrod (1915) 8 B. W. C. C. (Eng.) 474.*

<sup>6</sup> *Rex v. Crossley (Ct. Crim. App.) [1909] 1 K. B. (Eng.) 411, 78 L. J. K. B. N. S. 299, 100 L. T. N. S. 463, 25 Times L. R. 225, 73 J. P. 119, 53 Sol. Jo. 214, 22 Cox, C. C. 40.*

<sup>7</sup> A county court judge has no jurisdiction to give to the register a direction applicable to all cases, that the costs of all applications to review the weekly payments shall be treated as though the application were



trator, and the court will not interfere in the absence of special circumstances.<sup>8</sup> The costs should not be awarded to the

employer where the applicant secures a greater award than the employer had offered him.<sup>9</sup> And costs cannot prop-

a mere interlocutory application in the matter of the original arbitration, and not as an original arbitration or proceeding. *Rigby v. Cox* [1904] 2 K. B. (Eng.) 208, 73 L. J. K. B. N. S. 690, 91 L. T. N. S. 72, 20 Times L. R. 461, 68 J. P. 385.

No costs were awarded to either party where the award was, upon the application of the employer, cut down from \$385 to \$235. *Bruno v. International Coal & Coke Co.* (1913) 7 B. W. C. C. (Alberta) 1033.

Where, upon a request for arbitration, the arbitrator finds for the employers, he may include in the costs awarded the qualifying fee of the doctor, although the examination took place before the filing of the request for arbitration. *Jones v. Davies* [1914] 3 K. B. (Eng.) 549, [1914] W. N. 280, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1531, 7 B. W. C. C. 488.

The county court judge has no jurisdiction to allow, as a set-off against costs awarded the applicant on the arbitration, the costs granted to the employer on a prior appeal from interlocutory orders of the county court judge. *Sutton v. Great Northern R. Co.* (1910) 3 B. W. C. C. (Eng.) 160.

The employer is entitled to the fees of certain witnesses who had testified as experts that there was no accident, where the county court judge found that there was an accident, but that no incapacity had resulted therefrom, and consequently found for the employers. *Finlayson v. The Clinton* (1914) 7 B. W. C. C. (Eng.) 710. The ground upon which the county court judge had held that the employer was not entitled to costs for these witnesses was that they had gone out of their way and had assumed the functions of the court in testifying that there was no accident, and not upon the ground that they had testified as to a point upon which the employers had failed.

The county court has jurisdiction to order a workman to pay the employers' costs where the employer had stopped compensation, alleging that the workman was completely recovered, but, upon the workman's bringing proceedings, paid a sum into court which they admitted was due to the workman, but which had not been paid, through an oversight. *Thomas v. Cory Bros.* (1911) 5 B. W. C. C. (Eng.) 5.

The county court judge has no jurisdiction to order the employer to pay costs in a case where the employer and the workman had agreed upon a certain sum to be paid in redemption of the weekly payment, but the workman's parents subsequently objected to the recording of the agreement on the ground that the amount was inadequate, while the county court judge ordered the agreement to be recorded but further ordered the employer to pay the costs. *Reed v. The Wymerie* (1914) 7 B. W. C. C. (Eng.) 421.  
L.R.A.1916A.

The employers are entitled to withdraw an appeal to the court of appeal, and, upon the refusal of the workman to permit the appeal to be withdrawn, the court of appeal will grant the application made to it by the employers to withdraw the appeal, and the cost of the application will be offset against the costs to which the workman was entitled up to the time of the appeal. *Stephens v. Vickers* [1913] W. C. & Ins. Rep. (Eng.) 454, 6 B. W. C. C. 469.

It is within the discretion of the county court judge to direct that the employer pay the costs of proceedings instituted to compel him to pay compensation, which he had agreed to, but which he refused to pay until letters of administration were taken out by the widow. *Clatworthy v. Green* (1902) 50 Week. Rep. (Eng.) 610, 82 L. T. N. S. 702, 66 J. P. 596, 18 Times L. R. 641.

Where liability was admitted and the amount agreed upon, costs to the counsel for applicant were allowed for attending the hearing at which the terms of the agreement and the division of the money between the widow and daughter were sanctioned by the court. *Coleman v. Southeastern R. Co.* (1899; C. C.) 1 W. C. C. (Eng.) 151.

It is competent for the county court judge to refuse to make any order for costs in a case in which he dismissed an application for the termination of weekly payments upon the ground that the workman refused to submit himself to all examination under an anesthetic, where the county court judge believed that the difficulty had arisen solely from the workman's own conduct. *Lowestoft Corp. v. Aldridge* (1912) 5 B. W. C. C. (Eng.) 329.

In *McLaughlin v. Wemyss Coal Co.* [1912] W. C. Rep. 67, 49 Scot. L. R. 202, the court fixed a fee at 3½ guineas where a party had been awarded costs of a stated case.

Where the respondents never disputed their liability to pay full compensation, and had paid it and were continuing to pay it, they were entitled to have a memorandum of the implied agreement registered notwithstanding a request for arbitration had been filed; and where, under such request, an award with costs is made, an appeal must be allowed. *Jones v. Great Central R. Co.* (1901) 4 W. C. C. (Eng.) 23.

<sup>8</sup> In the absence of special circumstances, the court of appeal has no jurisdiction to vary the order of the county court judge, who, upon awarding compensation to the workman, refused to set off the costs of the employer from a successful appeal from a prior order granting compensation. *Barnett v. Port of London Authority* (1913) 108 L. T. N. S. (Eng.) 944, 82 L. J. K. B. N. S. 918, 57 Sol. Jo. 577, [1913] W. C. & Ins. Rep. 414, 6 B. W. C. C. 466.

<sup>9</sup> It is error for the county court judge to award costs to the employer after a sum was paid into court, where he had awarded

erly be awarded against an employer who has never disputed his liability to compensation nor the amount thereof, and has paid such an amount into court without arbitration proceedings being taken against him.<sup>10</sup> Costs may be awarded to the applicant although he does not secure as large an award as he had claimed,<sup>11</sup> but not where he secures a suspensory award only.<sup>12</sup>

Under the second schedule the county court judge cannot award a lump sum as costs.<sup>13</sup> Costs may be taxed immediately at the close of the hearing.<sup>14</sup>

Upon the full amount of taxed costs being paid into court for the purpose of obtaining a stay while the employers appealed to the House of Lords, the court of appeal cannot make the workman's solicitors personally liable for their return in the event of a further appeal being successful.<sup>15</sup>

The ordinary rules of practice of the court of appeal as to ordering security for costs on appeal are applicable to an appeal under the workmen's compensation act.<sup>16</sup> An application for security

for costs in an appeal under the compensation act, taken by the applicant, is to be made to the applicant first before the respondent can apply to the court for such security.<sup>17</sup> Security for costs may be ordered although the execution has been stayed by the county court judge, thus intimating that there was a question to be determined by the appellate court.<sup>18</sup> So, security for costs may be ordered where the appellant, although a poor man, was not in a position to make an affidavit for the purpose of appealing in forma pauperis.<sup>19</sup> And upon an appeal by the workman the employers are entitled to an order for security where there is evidence that the workman will be unable to pay the costs if unsuccessful, notwithstanding the fact that the workman's lack of means is due entirely to the accident.<sup>20</sup> And security for costs of appeal will be ordered, although the proceedings are being conducted for the applicant by a trade union.<sup>21</sup>

A different rule as to requiring security for costs appears to prevail in Ireland.<sup>22</sup>

to the workman a larger sum than that which the employer offered. *Williams v. Caeponthren Colliery Co.* [1913] W. C. & Ins. Rep. (Eng.) 155, 6 B. W. C. C. 122.

Where the county court judge found that the applicant was entitled to full compensation for a period during which the master had paid him only partial compensation, and further found that the workman was entitled to a larger amount as partial compensation than the employer had offered to give him, it is incompetent for the judge to further find that the workman should pay the employer costs. *Evans v. Gwauncaeurgurwen Colliery Co.* [1912] W. C. Rep. (Eng.) 215, 106 L. T. N. S. 613, 5 B. W. C. C. 441.

<sup>10</sup> *Lancaster v. Midland R. Co.* (1908; C. C.) 124 L. T. Jo. (Eng.) 439, 1 B. W. C. C. 418.

<sup>11</sup> Where an injured workman was in receipt of 10 shillings a week as compensation, and the employers sought to reduce it 2 shillings, but the county court judge diminished it to 7 shillings, 6 pence, costs may be awarded against the employer. *Connor v. Meads* (1912) 5 B. W. C. C. (Eng.) 435.

The court will not interfere with the exercise of the county judge's discretion in respect to awarding costs to the applicant, where the employer's answer was not an unconditional submission to pay a certain sum to the applicant, although the applicant did not recover more than the amount offered. *Nicholson v. Thomas* (1910) 3 B. W. C. C. (Eng.) 452.

<sup>12</sup> It is error for the county court judge to direct the employers to pay the cost where he sustained the contention of the employers that the workman was not inea-

pacitated, but made a suspensory award of 1 penny a week. *Snell v. Gross, Sherwood & Heald* [1913] W. C. & Ins. Rep. (Eng.) 141, 6 B. W. C. C. 242.

A workman is not entitled to costs where he claimed compensation for total incapacity, and was awarded merely a declaration of liability. *Derbyshire v. Hetherington* (1914) 7 B. W. C. C. (Eng.) 677.

<sup>13</sup> *Beadle v. The Nicholas* [1909] W. N. (Eng.) 227, 101 L. T. N. S. 586.

<sup>14</sup> *Gardner v. Cox* (1910) 3 B. W. C. C. (Eng.) 245.

<sup>15</sup> *Chilton v. Blair* (1914) 8 B. W. C. C. (Eng.) 1.

<sup>16</sup> *Hall v. Snowdon* [1899] 1 Q. B. (Eng.) 593, 68 L. J. Q. B. N. S. 363, 80 L. T. N. S. 256, 15 Times L. R. 244, 47 Week. Rep. 322, 1 W. C. C. 114; *Re Harwood* [1901] 2 K. B. (Eng.) 304, 70 L. J. K. B. N. S. 746, 84 L. T. N. S. 857.

<sup>17</sup> *Stanland v. Northeastern Steel Co.* (1906) 23 Times L. R. (Eng.) 1.

<sup>18</sup> *Shea v. Drolenvaux* (1903) 88 L. T. N. S. (Eng.) 679, 19 Times L. R. 473, 5 W. C. C. 144. The earlier case of *Hubbald v. Everitt* (1900) 16 Times L. R. 168, 5 W. C. C. 145, was distinguished on the ground that it was an exceptional case.

<sup>19</sup> *Rees v. Richard* (1899) 1 W. C. C. (Eng.) 118.

<sup>20</sup> *Brine v. May* (1912) 6 B. W. C. C. (Eng.) 460.

*Skeggs v. Keen* (1899) 1 W. C. C. (Eng.) 119, holding to the contrary, must be considered as overruled.

<sup>21</sup> *McLaughlin v. Clayton* (1899) 1 W. C. C. (Eng.) 116; *Haddock v. Humphreys* (1899) 1 W. C. C. (Eng.) 117.

<sup>22</sup> It is contrary to the policy of the workmen's compensation act to require the



And the general practice relating to security for costs is not applicable to proceedings under the Alberta workmen's compensation act.<sup>23</sup>

##### 5. Registration of memorandums of agreements.

A memorandum of an implied agreement may be registered.<sup>24</sup> But the coun-

workman to give security for the cost of his appeal to the court of appeal. *Hutchinson v. New Northern Printing & Weaving Co.* [1914] 2 I. R. 530, 48 Ir. Law Times, 33, 7 B. W. C. C. 971, following the case of *Stormount v. Workman, C. & Co.* decided by the Irish court of appeal in 1899, reported in [1914] 2 I. R. (Ir.) 532, note.

<sup>23</sup> *Cessarini v. Hazel* (1914) 7 B. W. C. C. (Alberta) 1059.

<sup>24</sup> *Jones v. Great Central R. Co.* (1901) 4 W. C. C. (Eng.) 23.

<sup>25</sup> The county court judge is not entitled to record a memorandum of agreement to pay compensation during total incapacity, and to continue until the same be ended, diminished, or increased, where there was no express agreement, either written or parol, although the employer had been paying full compensation to the workman for nearly a year. *Hartshorne v. Coppice Colliery Co.* (1912) 106 L. T. N. S. (Eng.) 609, 5 B. W. C. C. 358, [1912] W. C. Rep. 255.

A workman in the employ of the London county council is not entitled to have an agreement recorded where, after an injury, the council paid the workman compensation merely in accordance with its practice to pay compensation to injured workmen for so long as their doctors testified as to the workman's incapacity. *Godbold v. London County Council* (1914) 111 L. T. N. S. (Eng.) 691, 7 B. W. C. C. 409.

Where the employer objected to the recording of a memorandum of agreement to pay compensation, and thereafter, upon the commencement of arbitration proceedings by the employee, withdrew his objection to the agreement and it was recorded, and the county court judge dismissed the arbitration proceedings upon the ground that the dispute had been settled by agreement, the court of appeal sent the matter back to the county court judge upon the ground that he had not found that there was an agreement between the parties. *Rees v. Consolidated Anthracite Collieries* (1912) 5 B. W. C. C. (Eng.) 403, [1912] W. C. Rep. 205.

<sup>26</sup> *Shore v. The Hyrcania* (1911) 4 B. W. C. C. (Eng.) 207; *Lunt v. Sutton Heath & L. G. Collieries* (1911) 4 B. W. C. C. (Eng.) 219; *McGeown v. Workman, C. & Co.* (1911) 45 Ir. Law Times, 165; *Phillips v. Vickers* [1912] 1 K. B. (Eng.) 16, [1911] W. N. 193, 105 L. T. N. S. 564, 81 L. J. K. B. N. S. 123, [1912] W. C. Rep. 71, 5 B. W. C. C. 23; *Halls v. Furness* (1909) 3 B. W. C. C. (Eng.) 72; *McCarthy v. Stapleton-Bretherton* (1911) 4 B. W. C. C. (Eng.) 281.

The county court judge is justified in L.R.A.1916A.

ty court judge has no power to record an agreement when no agreement, express or implied, has in fact been made,<sup>25</sup> or to record a memorandum of an agreement different from that actually made.<sup>26</sup>

The word "genuine" is not to be confined to "admitted" or "proved" in fact. It extends to the meaning of "existing as evidencing an obligation enforceable

refusing to register an agreement which purported to provide for the payment to the workman of full compensation during total or "partial" incapacity, where it appeared that the actual agreement was to pay compensation only during total incapacity. *Maundrell v. Dunkerton Collieries Co.* (1910) 4 B. W. C. C. (Eng.) 76.

A workman is not entitled to have recorded an agreement which does not contain the words "during the period of total incapacity for work," which were contained in certain receipts which he had given for compensation, which receipts formed the basis of the agreement. *Moore v. Pryde* (1912) 50 Scot. L. R. 302, 6 B. W. C. C. 384.

The county court judge is not justified in ordering a filing of a memorandum of agreement to the effect that the employer agreed to pay the workman a fixed sum from the date of the accident, no time limit being fixed, where the only agreement made by the employer was to pay the fixed sum so long as its own doctor certified that incapacity existed. *Phillips v. Vickers* [1912] 1 K. B. (Eng.) 16, 81 L. J. K. B. N. S. 123, 105 L. T. N. S. 564, 5 B. W. C. C. 23, [1911] W. N. 193, [1912] W. C. Rep. 71.

In *M'Lean v. Allan Line S. S. Co.* [1912] S. C. 256, 49 Scot. L. R. 207, 5 B. W. C. C. 527, the Lord President said: "The real dispute is upon the words that occur after the provision as to payment during total disablement; namely, the words, 'the amount of any payment due during partial disablement to be settled hereafter.' In the document as signed the words are as I have read them; whereas, in the memorandum as proposed to be recorded, those words are replaced by the words 'during incapacity for work, or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said act.' Now the appellant maintains that those words in the memorandum are really simply a more accurate and proper way of expressing what the words in the written agreement bore. The respondents, on the other hand, say no, and in particular maintain that it will make an important practical difference to them, because they say that the result of recording the memorandum as proposed will be that if the seaman partially recovers, they will be bound to pay if charged until they can get the payment reviewed in a process of review; and that, albeit that eventually decree in that process of review will draw back to the term of presenting the petition, yet never-

either presently or at a future date.”<sup>27</sup> Where there is no evidence on which the county court judge may find that an agreement is not genuine, it must be registered, and thereafter the judge has no power to hear an application for compensation.<sup>28</sup> If there is a variation not trivial between the memorandum of agreement proposed to be recorded, and the agreement actually entered into, it is not for the arbiter to decide whether the difference is so substantial as to prevent the agreement in the memorandum being considered genuine.<sup>29</sup> Where the agreement was to pay the workman weekly compensation “in terms of the act,” a memorandum of an agreement may be recorded to the effect that the employers agreed to pay compensation under the act “until the same is ended, diminished, redeemed, or suspended,” since the words added were merely an expansion of the words, “in the terms of the compensation act.”<sup>30</sup> A memorandum is genuine so as to be entitled to be recorded although it omits to mention the stipula-

tion that the expenses were to be paid by the employer.<sup>31</sup> The sheriff-substitute errs in refusing to record an agreement to pay compensation during incapacity as not genuine in that the agreement was to pay only during total incapacity, where the main evidence of the agreement was receipts which stated that the payments were “accepted as the amount payable under the workmen’s compensation act 1906.”<sup>32</sup>

As to the effect of an agreement to oust the power of the arbitrator, see ante, 79.

Upon the workman’s application to record an agreement, the county court judge is not authorized to decline to record the agreement, on the ground that the applicant is not a workman,<sup>33</sup> nor upon the ground that he had not met with an accident,<sup>34</sup> nor upon the ground that the amount to be paid was too high.<sup>35</sup> A workman is entitled to have a memorandum of agreement recorded although the employer, after paying full compensation for a number of weeks,

theless they may find themselves in this unpleasant position, that during the time the case has taken to decide they have had to pay the full sum, and that sum they will never get back; whereas if the agreement was recorded in the precise terms in which it was written they could not be charged to pay during the period after they had alleged that total incapacity had ceased; or rather, to put it more accurately, that if a charge were presented against them, they would be able to suspend it, and therefore would not be in the position of having to pay the money that they eventually would not be able to get back. Now, I do not think, although we have had a discussion on the question, that we need decide at present whether the one set of words is exactly the same as the other, or is not. The only thing we can decide to-day is, what is the sheriff’s duty when a memorandum is produced to him for the purpose of being recorded and the genuineness of it is disputed? Now, with regard to this matter, the sheriff is not really acting as arbiter at all; he is acting in a semi-ministerial capacity.”

<sup>27</sup> Buckley, L. J., in *Popple v. Frodingham Iron & Steel Co.* [1912] 2 K. B. (Eng.) 141, 81 L. J. K. B. N. S. 769, 106 L. T. N. S. 703, 5 B. W. C. C. 394.

<sup>28</sup> *Fox v. Battersea Borough Council* (1911) 4 B. W. C. C. (Eng.) 261.

<sup>29</sup> A workman is not entitled to have a memorandum of agreement recorded against the opposition of the employer where it did not contain the phrase “during the period of total incapacity for work,” which was contained in several receipts for compensation which the master had previously given him on account of the same injury. *Moore v. Pryde* [1913] S. C. 457, 50 Scot. L. R. L.R.A.1916A.

302, [1913] W. C. & Ins. Rep. 100, 6 B. W. C. C. 384.

<sup>30</sup> *Babcock v. Pearson* [1913] S. C. 959, 50 Scot. L. R. 790, [1913] W. C. & Ins. Rep. 430, 6 B. W. C. C. 841.

<sup>31</sup> *McLaughlin v. Pumpherston Oil Co.* (1914) 52 Scot. L. R. 48, 8 B. W. C. C. 354.

<sup>32</sup> *Scott v. Sanquhar & K. Collieries* (1915) 52 Scot. L. R. 391, 8 B. W. C. C. 405.

<sup>33</sup> The county court judge cannot refuse to record an agreement entered into by the workman and the employers on the ground that the applicant is not a workman within the meaning of the act, since that question has been settled by the agreement. *Goodsell v. The Lloyds* [1914] 3 K. B. (Eng.) 1001, 30 Times L. R. 622, 83 L. J. K. B. N. S. 1733, 7 B. W. C. C. 631.

<sup>34</sup> An agreement may be registered although at the time when it is made the employers did not admit liability under the act, having taken the position that the pursuer had not met with an accident. *McGuire v. Paterson* [1913] S. C. 400, 50 Scot. L. R. 289, [1913] W. C. & Ins. Rep. 107, 6 B. W. C. C. 370.

<sup>35</sup> The sheriff’s clerk, before filing a memorandum of agreement, is not bound to ascertain the facts connected with the accident and the probable duration of the injuries resulting therefrom. (Scot.) *Ibid.*

Objections by the employers that an agreement had been made under essential error as to the rights of parties under the act, and that the sum agreed to be paid was more than half of the workman’s average weekly earnings, are irrelevant as answers to a petition for warrant to register an agreement which is not denied. *Macdonald v. Fairfield Shipbuilding & Engi-*



had offered the workman light labor at the same pay, although it was admitted that the laborer had not entirely recovered.<sup>36</sup>

An agreement which is no longer in force cannot be recorded; as where the workman had signed a final discharge of his claim,<sup>37</sup> or where the incapacity had ceased.<sup>38</sup> It would appear that a contrary decision was rendered in an early case in the court of appeal, and also in the second division in the court of sessions.<sup>39</sup> But these decisions were said in the judgment in the Popple Case to be distinguished probably by the facts in the cases; if not, the conclusions reached were disapproved.<sup>40</sup> It was also held in a comparatively early case that the memorandum of agreement to pay compensation should be registered on application, although it had been terminated by a subsequent agreement.<sup>41</sup>

The workman is entitled to have the memorandum of agreement registered, although he has recovered and is earn-

ing more than before his injury, where he is likely to be incapacitated from time to time in consequence of his injury.<sup>42</sup>

Proceedings for the recording of a memorandum of agreement to which a minute of objection has been lodged, and proceedings for arbitration for compensation in the same case, cannot be joined.<sup>43</sup>

Where a verbal agreement for the payment of a certain weekly compensation was entered into between the master and the injured workman, it was held that this agreement, after having been recorded, fixed the rights of the parties until another agreement should be recorded. It is not displaced by a subsequent unrecorded agreement.<sup>44</sup> The question whether one agreement has been superseded by another is to be determined in an application for review, and not to be determined in a suspension in the supreme court; <sup>45</sup> so also is the question whether or not incapacity has ceased.<sup>46</sup>

neering Co. (1905) 8 Sc. Sess. Cas. 5th series (Scot.) 8.

<sup>36</sup> *Keevans v. Mundy* [1914] S. C. 525, 2 Scot. L. T. 350, 51 Scot. L. R. 462, 7 B. W. C. C. 883.

<sup>37</sup> The arbitrator can competently determine the validity of an alleged discharge, in an application to record a memorandum of agreement. *Hanley v. Niddrie & B. Coal Co.* [1909-10] S. C. (Scot.) 875.

<sup>38</sup> In *Popple v. Frodingham Iron & Steel Co.* [1912] 2 K. B. (Eng.) 141, 81 L. J. K. B. N. S. 769, 106 L. T. N. S. 703, [1912] W. C. Rep. 231, 5 B. W. C. C. 394, the court of appeal held that an agreement to pay compensation during total incapacity could not be recorded after the total incapacity had ceased. *Cozens-Hardy, M. R.*, apparently took the view that *Coakley v. Addie* [1909] S. C. 545, 46 Scot. L. R. 408, 2 B. W. C. C. 437, *infra*, was in some way distinguishable; but in his discussion of the case he does not make it clear what the distinction is, and *Buckley, L. J.*, stated expressly that he was not able to agree with the court in the *Coakley Case*.

No warrant to record an agreement should be granted where the agreement sought to be recorded has been superseded and brought to an end by the report of a referee appointed by a joint letter, that incapacity had ceased. *McNaughton v. Cunningham* [1909-10] S. C. 980, 47 Scot. L. R. 781, 3 B. W. C. C. 576, 577.

A memorandum of agreement to pay compensation is barred from being recorded where the condition of the workman was submitted to a medical referee and he reported him fit for work. (Scot.) *Ibid*.

Under sched. 2, § 9, subs. B, where a workman has returned to work at the same or better wages than before the accident, but is subsequently dismissed because of a L.R.A.1916A.

reduction of the staff, and not because of incapacity, he cannot have the unrecorded agreement under which he had been receiving compensation recorded. *Matthews v. Baird* [1910] S. C. 689, 47 Scot. L. R. 627.

<sup>39</sup> The only duty of the registrar of the county court under paragraph (8) is to ascertain whether the memorandum actually represents the agreement of the parties; he cannot refuse to record it simply because changed conditions would not entitle the workman to the amount of compensation fixed. *Blake v. Midland R. Co.* [1904] 1 K. B. (Eng.) 503, 73 L. J. K. B. N. S. 179, 68 J. P. 215, 90 L. T. N. S. 433, 20 Times L. R. 191.

See also *Coakley v. Addie* [1909] S. C. 545, 46 Scot. L. R. 408, 2 B. W. C. C. 437.

<sup>40</sup> In the *Blake Case* the agreement was for "payment during total or partial incapacity;" and *Buckley, L. J.*, pointed out that as long as incapacity of any kind existed, there could be no objection to recording the agreement. In the *Coakley Case* it is possible that the judge had in mind the possibility of incapacity recurring.

<sup>41</sup> *Keeling v. Eastwood* (1904) 116 L. T. Jo. (Eng.) 595, 6 W. C. C. 167.

<sup>42</sup> *Cammick v. Glasgow Iron & Steel Co.* (Ct. of Sess.) 4 F. 198, as cited in 2 *Mews' Dig. Supp.* 1578.

<sup>43</sup> *Arniston Coal Co. v. King* [1913] S. C. 892, 50 Scot. L. R. 685, [1913] W. C. & Ins. Rep. 388, 6 B. W. C. C. 826.

<sup>44</sup> *Fife Coal Co. v. Davidson* [1906-07] S. C. (Scot.) 90.

<sup>45</sup> *Fife Coal Co. v. Lindsay* [1908] S. C. 431, 45 Scot. L. R. 317, 1 B. W. C. C. 117.

<sup>46</sup> Where under an agreement a workman has received weekly payments of compensation, which were varied or discontinued by employers, and he afterwards records

Two cases involving the construction of particular agreements will be found in the note.<sup>47</sup>

Schedule II. (9) (b) does not give the arbitrator the discretion to refuse to record an agreement in a case where the workman has returned to work and is earning the same wages as before the accident; he should record the memorandum or agreement and attach such conditions thereto as, in the circumstances, he thinks just.<sup>48</sup>

#### 6. Proceedings by "parties interested."

The court of appeal has held that an approved society under the national insurance act of 1911 is not a "party in-

terested" within the meaning of the phrase as used in schedule II. ¶ 9, of the workmen's compensation act.<sup>49</sup> Whether or not an approved society is a "party interested" within the meaning of this paragraph of schedule 2 was raised, but not decided, in a Scotch case.<sup>50</sup>

By § 11 (2) of the national insurance act of 1911, when an insured person appears to be entitled to compensation and "unreasonably refuses or neglects to take proceedings," the society concerned may take proceedings on his behalf. What constitutes unreasonable refusal to take proceedings in his own behalf has been passed upon in a few cases.<sup>51</sup>

It has been held that a trade union may

a memorandum of that agreement and charges for payment, the court, with regard to payments due for the period subsequent to recording, will not suspend the charge, the employers' remedy lying in an application for review. *Loehgelly Iron & Coal Co. v. Sinclair* [1909] S. C. (Scot.) 922.

<sup>47</sup> An agreement between the employer and the injured workman that the employer is to pay full compensation until a certain day, and that thereafter he is to furnish the workman light work at his prior wages, and that should the workman "be unable to do such light work or other work at any time hereafter by reason of the injuries received as aforesaid, his claim for compensation is to revive," is terminated upon the recurrence of his total incapacity, and upon the subsequent recovery of capacity to do light work he must rely upon the act, and not upon the contract, and consequently is not entitled to receive as compensation the full difference between his present wages and the amount received prior to his injury. *Branford v. North Eastern R. Co.* (1910) 4 B. W. C. C. (Eng.) 84.

A workman who, by an unrecorded agreement, received compensation for over a year, and was subsequently employed for over seven years at light labor, the payments ceasing upon his being so employed, is not thereafter, upon the recurrence of total incapacity, estopped from filing an ordinary claim for compensation. *Dempster v. Baird* [1908] S. C. 722, 45 Scot. L. R. 432, 1 B. W. C. C. 62. The view taken by the court was that the agreement having been supplanted by an agreement to pay wages, which agreement continued for over seven years, could not be held to be in force, and consequently the remedy of the workman was to bring an ordinary claim for compensation.

Upon a second appeal, it was held that he was barred from claiming any compensation in respect of his partial incapacity during the seven years. [1909] S. C. 127, 46 Scot. L. R. 119.

<sup>48</sup> *Scott v. Sanquhar & K. Collieries* (1915) 52 Scot. L. R. 391, 8 B. W. C. C. 405.  
L.R.A.1916A.

<sup>49</sup> *Bonney v. Hoyle* [1914] 2 K. B. (Eng.) 257, 83 L. J. K. B. N. S. 541, 136 L. T. Jo. 376, 30 Times L. R. 280, 58 Sol. Jo. 268, [1914] W. N. 43, 12 L. G. R. 358, 110 L. T. N. S. 729, 7 B. W. C. C. 168, holding that such society has no right to intervene and object to the recording of a memorandum of agreement.

<sup>50</sup> *Baird v. Ancient Order of Foresters* [1914] S. C. 965, 51 Scot. L. R. 819, 7 B. W. C. C. 943. In this case it was held that it is error for the sheriff-clerk, upon the lodging of an agreement between the employer and an injured workman, whereby the weekly payments were to be redeemed by a lump sum, and the subsequent lodging by an approved society of a minute objecting to the recording of the memorandum of agreement upon the ground that the sum was inadequate, to hand on the minute to the sheriff, as it was the duty of the sheriff-clerk to consider the information tendered him, and then for him, if he were satisfied, to prepare and lodge a minute setting forth all his reasons, so that the memorandum could then be dealt with as an application for arbitration on the question raised in the sheriff-clerk's minute.

<sup>51</sup> Where a workman received an injury for which he was paid compensation for three weeks, and thereafter returned to work for about six months, when he became unwell and underwent an operation, and for about three months received insurance from an approved society of which he was a member, and informed the society that, in his view, his illness was not the result of the prior accident, and that he did not propose to take proceedings against the employer for compensation, it is not competent for the approved society to take them in his name, since the workman has not unreasonably refused or neglected to take such proceedings. *Rushton v. Skey* [1914] 3 K. B. (Eng.) 706, [1914] W. N. 281, 137 L. T. Jo. 212, 30 Times L. R. 60, 83 L. J. K. B. N. S. 1503, 111 L. T. N. S. 700, 58 Sol. Jo. 685, 7 B. W. C. C. 508.

A workman does not unreasonably refuse nor neglect to take proceedings for recovery of compensation himself, so as to entitle an approved society to take pro-



help the workman, but it is not open to it to take proceedings in the workman's name.<sup>52</sup>

### 7. Enforcement of awards and agreements.

The memorandum of the compensation awarded by an arbitrator under the act, when recorded in the manner prescribed by ¶ (8), may be enforced by an order of committal under the debtors' act 1869, § 5.<sup>53</sup> So an award may be enforced by judgment, summons, and imprisonment.<sup>54</sup> An agreement to pay compensation as long as total incapacity lasts cannot be enforced by execution after the employer raises the question that total incapacity has ceased.<sup>55</sup> So, an agreement made by the employers to pay a certain sum "during the time of the incapacity" of a workman injured while employed does

not entitle the workman to obtain execution without a hearing, upon the question being raised by the employer that the incapacity had ceased.<sup>56</sup>

Under the British Columbia act, the county court cannot issue an execution against the employers of a deceased workman for the compensation awarded to his father, where the employer had paid money into court in full settlement of the claim before the award.<sup>57</sup>

### 8. Rectification of the register.

A few cases have passed upon the power of the arbitrator to rectify the register under schedule II. ¶ 9 (c).<sup>58</sup> The county court judge does not have power to set aside the judgment filed in his court by the duly appointed arbitrator, since this does not amount to a rectification of the register.<sup>59</sup>

ceedings in his name, where the evidence showed that the workman was anxious to bring the proceedings, but had not the necessary money so to do. *Burnham v. Hardy* (1915) 84 L. J. K. B. N. S. (Eng.) 714, [1915] W. C. & Ins. Rep. 146, 8 B. W. C. C. 57.

<sup>52</sup> *Bobby v. Crosbie* (1915) 84 L. J. K. B. N. S. (Eng.) 856, 112 L. T. N. S. 900, 8 B. W. C. C. 236.

The county court judge is not entitled to dismiss an application for compensation because the counsel for applicant declines to state whether he appears for the workman or for an approved society; he should first hear the evidence and ascertain in that way whether it is the workman's application or that of the society. *Allen v. Francis* [1914] 3 K. B. (Eng.) 1065, 30 Times L. R. 695, 83 L. J. K. B. N. S. 1814, 58 Sol. Jo. 753, 7 B. W. C. C. 779.

<sup>53</sup> *Bailey v. Plant* [1901] 1 K. B. (Eng.) 31, 70 L. J. Q. B. N. S. 63, 65 J. P. 49, 49 Week. Rep. 103, 83 L. T. N. S. 459, 17 Times L. R. 48.

<sup>54</sup> *Johnson v. Adshead* (1900; C. C.) 109 L. T. Jo. (Eng.) 40, 2 W. C. C. 158.

<sup>55</sup> *Warren v. Roxburgh* (1912) 106 L. T. N. S. (Eng.) 555, 5 B. W. C. C. 263.

<sup>56</sup> *Said v. Welsford* (1910) 3 B. W. C. C. (Eng.) 233.

<sup>57</sup> *British Columbia Copper Co. v. McKittrick* (1913; B. C.) 7 B. W. C. C. 1037.

<sup>58</sup> The county court judge had no jurisdiction to rectify the register upon the ground that the applicant was an adult, and only entitled to one half compensation, while the memorandum of agreement, assuming that she was a minor, awarded her full compensation. *Schofield v. Clough* (1912) 5 B. W. C. C. (Eng.) 417, [1912] W. C. Rep. 301. The employers subsequently applied under schedule II. ¶ 9 (e) (1) to have the record of memorandum removed from the register, and the court of appeal held that there was no jurisdiction to grant an order to this effect. [1913] 2 K. B. L.R.A.1916A.

(Eng.) 103, 82 L. J. K. B. N. S. 447, 108 L. T. N. S. 532, 57 Sol. Jo. 243, [1913] W. C. & Ins. Rep. 292, 6 B. W. C. C. 66.

Where the respondents had come to an agreement as to the payment of compensation with a workman who was injured on board a vessel some miles from the dock, so that, as it was alleged, the act did not apply, but the payments were in the nature of a gratuity, and the county court judge had ordered such agreement registered over the respondents' objection that the agreement was purely an act of grace, and the respondents did not appeal from this order, but subsequently applied to the judge for a rectification of the register, the court of appeal held that, as there was no mutual mistake or fraud, and the memorandum had been declared to be genuine, and had been recorded as such, the matter was finally settled between the parties, and could not be gone into for the purpose of determining whether it was simply an agreement of words or one of law. *Masterman v. Ropner* (1909) 127 L. T. Jo. (Eng.) 8.

The authority given to the sheriff to rectify the register does not, in an application to rectify, empower him to determine questions as to the rights and liabilities of the parties. *Baird v. Stevenson* [1906-07] S. C. (Scot.) 1259.

A county court judge may alter his verbal award, but after the written award has been signed and sealed, he has no power to alter it except to correct a clerical error. *Mowlem v. Dunne* [1912] 2 K. B. (Eng.) 136, 81 L. J. K. B. N. S. 777, 106 L. T. N. S. 611, [1912] W. N. 98, [1912] W. C. Rep. 298, 5 B. W. C. C. 382. In his signed award, the arbitrator had not given the applicant costs, and he attempted to correct the award by including a provision allowing costs to the workman.

<sup>59</sup> *British Columbia Copper Co. v. McKittrick* (1913; B. C.) 7 B. W. C. C. 1037.

*9. Agreements as to lump sums.*

Under schedule II. § 9, (d), the arbitrator has the power to pass upon the adequacy of a lump sum agreed upon by the parties for the redemption of the weekly payment,<sup>60</sup> but if he finds the amount agreed upon inadequate, he has no power to fix the amount to be paid in redemption of the weekly payment.<sup>61</sup>

An agreement to give an injured workman a lump sum and to give him "regular" employment, in lieu of all claim under the act, is not broken by a dismissal of the workman after three years, where the agreement contained no term of endurance for the employment.<sup>62</sup>

<sup>60</sup> It is the duty of the county court judge to pass upon the adequacy of an agreement for the redemption of a weekly payment by a lump sum. *The Segura v. Blampied* (1911) 4 B. W. C. C. (Eng.) 192.

Where a workman objects to the filing of a memorandum of an agreement for the payment of a lump sum upon the ground that the sum was inadequate, and that the agreement, although signed by him, was so signed under a misrepresentation on the part of the employers, the sheriff's substitute errs in granting a warrant to record the memorandum without inquiry into the adequacy of the amount and the misrepresentation averred. *Burns v. Baird* [1913] S. C. 358, 50 Scot. L. R. 280, [1913] W. C. & Ins. Rep. 61, 6 B. W. C. C. 362.

Where an employer and the workman have entered into an agreement whereby the employer shall redeem by a lump sum weekly payments of compensation payable to the workman, it is *prima facie* the duty of the registrar to record a memorandum of the agreement on being satisfied of its genuineness, and if the adequacy of the sum is called in question, the registrar, proceeding under schedule 2, § 9, must inquire whether the sum is adequate. *Rex v. Registrar of Bow County Ct. (Div. Ct.)* [1914] 3 K. B. (Eng.) 266, [1914] W. N. 223, 83 L. J. K. B. N. S. 1806, 111 L. T. N. S. 277.

The refusal of the county court judge to record an agreement for a lump sum settlement, on the ground of inadequacy, will not bind him to award compensation to the workman on his subsequent application for compensation, where the judge finds that the incapacity is no longer due to the accident. *Beech v. Bradford Corp.* (1911) 4 B. W. C. C. (Eng.) 236.

In *Johnson v. Oceanic Steam Nav. Co.* (1912) 5 B. W. C. C. (Eng.) 322, the court of appeals sustained the ruling of the county court judge that the sum of £10 is not an adequate settlement of a claim for £180, although the employer denied all liability under the act.

An order approving a compromise where there are minor children should not be "by consent," but "in the opinion of the court, the term being for the benefit of the in-  
L.R., 1916A.

The death of either party to a valid agreement for the redemption of weekly payments by a lump sum does not prevent the subsequent registration of such agreement, so as to make it enforceable as a county court judgment under schedule II. ¶ 9.<sup>63</sup>

It has been held, in construing ¶ 4 of rule 56a of the Rules of 1908, that if someone on behalf of infant dependents agreed, so far as he could, to the payment of a certain sum into court, and the registrar was satisfied with the amount and signed the receipt, the agreement was binding upon the infant.<sup>64</sup>

There is nothing in the act to prevent

fant." *Coulson v. Worshipful Company of Drapers* (1911) 5 B. W. C. C. (Eng.) 136.

<sup>61</sup> Where the registrar has refused to register an agreement between the employer and the workman for substitution of a lump sum for weekly payments, and the matter has been referred to the judge under sched. II., ¶ 9 (d), all the latter can do is to decide whether the agreement ought or ought not to be registered. *Mortimer v. Secretan* [1909] 2 K. B. (Eng.) 77, 78 L. J. K. B. N. S. 521, 100 L. T. N. S. 721. The registrar of the court refused to register the agreement upon the ground that the lump sum was inadequate, and referred the matter to the county court judge, who found it inadequate and assessed the amount to be paid at the sum which admittedly would be payable if it were to be computed under schedule I. ¶ 17 of the act; but the court of appeal held that the county court judge had exceeded his authority.

In passing upon an agreement to pay and accept a lump sum, it is a misdirection for the county court judge to treat the maximum weekly payment which the workman was receiving as a permanent payment which the employer was required to pay. *O'Neill v. Anglo-American Oil Co.* (1909) 2 B. W. C. C. (Eng.) 434.

The sheriff's substitute, to whom the adequacy of an agreement to receive weekly payments by a lump sum had been referred by a sheriff's clerk, has no power to require the workman to consign the amount of the lump sum, less the sum which would be the amount of compensation *prima facie* due to the workman in the event of the registration of the memorandum being refused. *M'Vie v. Taylor* (1914) 2 Scot. L. T. 342, 51 Scot. L. R. 435, 7 B. W. C. C. 891.

<sup>62</sup> *Lawrie v. Brown* [1908] S. C. (Scot.) 705.

<sup>63</sup> *Price v. Westminster Brymbo Coal & Coke Co.* [1915] 2 K. B. (Eng.) 128, 84 L. J. K. B. N. S. 746, 112 L. T. N. S. 905, 31 Times L. R. 219, [1915] W. N. 69, 59 Sol. Jo. 301, 8 B. W. C. C. 257. In this case the workman, after agreeing upon the lump sum, died, and his personal representative sought to enforce the agreement.

<sup>64</sup> *Rhodes v. Soothill Wood Colliery Co.*



an adult workman who has entered a claim for award from coming, before any payment of a weekly sum has been made, to an arrangement by way of compromise with the employer that the employer will pay and he will accept a sum of money in satisfaction of all of his claim.<sup>65</sup> But the acceptance of money legally due to a workman for compensation is not a consideration for a contract relieving the employer from all future liability.<sup>66</sup>

A release by a seaman under § 136 of the merchants shipping act of 1894, which releases the shipowner from all claim in respect to the past voyage, does not bar him from subsequently claiming compensation under the workmen's compensation act for injuries received while on shipboard, but the incapacity from which did not develop until afterwards, although the seaman made no reservation of such claim under § 60 of the merchants shipping act of 1906.<sup>67</sup>

The mere fact that an infant, injured in the course of employment, signs a release upon receiving payment of a small amount, will not prevent him from recovering the full compensation due him under the act, where he has tendered back the amount received from the employer.<sup>68</sup>

Under schedule II. ¶ 10, an injured workman is not barred from claiming compensation in the county court by an agreement which is not registered.<sup>69</sup>

[1909] 1 K. B. (Eng.) 191, [1908] W. N. 252 [1909] 1 K. B. 191, 78 L. J. K. B. N. S. 141, 100 L. T. N. S. 14.

<sup>65</sup> In *Ryan v. Hartley* [1912] 2 K. B. (Eng.) 150, 5 B. W. C. C. 407, Cozens-Hardy, M. R., said: "What do the words 'liability to continue to make that weekly payment' mean? They presuppose that there has been a weekly payment made which would have continued but for the existence of an agreement to pay a lump sum. In my opinion, that clause has no application whatever to a case where, as here, no weekly payment has ever in fact been made, even though the gross sum paid was a sum which may be said to have been calculated with reference to the workman's weekly wages."

<sup>66</sup> *Hughes v. Vothey Quarry Co.* (1908; C. C.) 125 L. T. Jo. (Eng.) 471, 1 B. W. C. C. 416.

<sup>67</sup> *Buls v. The Teutonic* [1913] 3 K. B. (Eng.) 695, 82 L. J. K. B. N. S. 1331, 109 L. T. N. S. 127, 29 Times L. R. 675, [1913] W. N. 238, 6 B. W. C. C. 653.

<sup>68</sup> *Darnley v. Canadian P. R. Co.* (1908) 14 B. C. 15, 2 B. W. C. C. 505.

<sup>69</sup> *Bates v. Holding* [1914] W. C. & Ins. Rep. (Eng.) 6, 7 B. W. C. C. 80.

<sup>70</sup> *Rex v. Owen* [1902] 2 K. B. (Eng.) 436, 71 L. J. K. B. N. S. 770, 87 L. T. N. S. 298, 18 Times L. R. 701. L.R.A.1916A.

# *10. Court in which proceedings may be brought.*

When a workman, resident in England, is injured by an accident occurring in England, but his employer resides in Scotland, proceedings for compensation under the act may be taken in the county court of the district in which the accident occurred, and service of the necessary notices may be effected by registered post.<sup>70</sup>

## *11. Deductions from awards.*

Under schedule II. § 14, where the arbitrator had fixed the amount of a lump sum to be paid in redemption of a weekly payment, and the employer admitted that a less sum was due, but paid the greater sum into court and appealed the case, an application by the workman for leave to take a sum out of the amount on deposit, for use in resisting the appeal, will be denied.<sup>71</sup>

## *12. Reference to medical referees.*

Under ¶ 15 of the second schedule, the arbitrator may refer a case to a medical referee whenever the evidence as to the condition of the workman is conflicting,<sup>72</sup> But it is incompetent for an arbitrator to remit to the medical referee where no evidence has been taken under the application.<sup>73</sup> And the power of the county court judge to remit a case to a medical referee under schedule II. ¶ 15,

<sup>71</sup> *Marshall v. Prince* [1914] 3 K. B. (Eng.) 1047, [1914] W. N. 330, 7 B. W. C. C. 381. *Swinfen-Eady, L. R.*, said: "It is a bad principle to order money to be paid out of court in respect of future costs when no costs had been incurred up to that time."

<sup>72</sup> The county court judge is entitled to refer a case in which the medical evidence is conflicting, to a medical referee. *Henricksen v. The Swanhilda* (1911) 4 B. W. C. C. (Eng.) 233.

It is competent for the arbitrator, with the view of fixing the weekly payment in the application for review, to remit to a medical practitioner appointed for the purposes of the act to report as to the condition of the workman. *Niddrie & B. Coal Co. v. McKay* (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 1121.

<sup>73</sup> *Gray v. Carroll* [1910] S. C. 700, 47 Scot. L. R. 646, 3 B. W. C. C. 572.

"A medical referee ought to have before him evidence given by the doctors on both sides, and when the judge is not able to decide the case by reason of a conflict of evidence, he must refer it to the medical referee; but to refer it to the referee without having heard the evidence makes it impossible for the order to stand." *Cozens-Hardy, M. R.*, in *Peill v. Payne* (1915) 8 B. W. C. C. (Eng.) 111.

extends to a case where a workman had been killed, and there was conflicting medical evidence as to the cause of the death.<sup>74</sup> An agreement in advance to submit any dispute to the decision of a medical referee is void.<sup>75</sup>

Notwithstanding a reference to the medical referee, the county judge should form an independent judgment, and is not bound by the referee's report.<sup>76</sup>

The report of a medical referee appointed by an arbitrator is intended for the use of the arbitrator only; but it is in his discretion to allow respondents to see the report and make a copy of it.<sup>77</sup>

A medical referee appointed under ¶ 5 should not sit with the county court judge as assessor on an issue upon which he has already given an opinion as medical referee.<sup>78</sup>

### 13. Provisions applicable to Scotland only.

Where, under schedule II. (17), the case is remitted to the sheriff's substitute to find whether the notice of the accident was given as soon as practicable, the arbitrator may take further proof, and may examine the doctor who attended the applicant during the illness following the accident.<sup>79</sup>

Under the act of 1897, the decision of either division of the court of session was final and no appeal lies to the House of Lords;<sup>80</sup> but, under the express terms of the act of 1906, schedule II. ¶ 17, such an appeal does lie.

## XXII. Act of 1900.

### a. Text of the act.

Section 1.—(1) From and after the commencement of this act, the workmen's compensation act 1897 shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment.

<sup>74</sup> *Carolan v. Harrington* [1911] 2 K. B. (Eng.) 733, 80 L. J. K. B. N. S. 1153, 105 L. T. N. S. 271, 27 Times L. R. 486, 4 B. W. C. C. 253.

<sup>75</sup> A clause in an agreement between the employer and the workman providing that if the workman refuse to submit himself to a medical referee on any questions subsequently arising as to his condition or fitness to work, he would forfeit all further claim to compensation, is void. *British & S. A. Steam Nav. Co. v. Neil* (1910) 3 B. W. C. C. (Eng.) 413.

<sup>76</sup> *Quinn v. Flynn* (1910) 44 Ir. Law Times, 183, 3 B. W. C. C. 594; *Jackson v. Scotstoun Estate Co.* [1911] S. C. 564, 48 L.R.A.1916A.

(2) Where any such employer agrees with a contractor for the execution by or under that contractor of any work in agriculture, § 4 of the workmen's compensation act 1897 shall apply in respect to any workmen employed in such work as if that employer were an undertaker within the meaning of that act. Provided, that, where the contractor provides and uses machinery driven by mechanical power, for the purpose of threshing, ploughing, or other agricultural work, he, and he alone, shall be liable under this act to pay compensation to any workman employed by him on such work.

(3) Where any workman is employed by the same employer mainly in agricultural, but partly or occasionally in other, work, this act shall apply also to the employment of the workman in such other work.

The expression "agriculture" includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.

Section 2.—This act may be cited as the workmen's compensation act 1900, and shall be read as one with the workmen's compensation act 1897, and that act and this act may be cited together as the workmen's compensation acts 1897 and 1900.

Section 3. This act shall come into operation on the 1st day of July, 1901.

This statute is supplanted by the general act of 1906.

### b. Effect of these provisions.

The act of 1900 had received but little attention from the courts before it was repealed by the act of 1906.

Threshing was held to be agricultural work within the meaning of this act.<sup>81</sup> So, a workman, although a proportion of his time acting as a game keeper, might be found to be engaged in agricultural employment within the meaning of the

*Scot. L. R.* 440, 4 B. W. C. C. 381; *Dowds v. Bennie* (1902) 5 Sc. Sess. Cas. 5th series (Scot.) 268.

<sup>77</sup> *Bowden v. Barrow Bros.* (1901; C. C.) 3 W. C. C. (Eng.) 215.

<sup>78</sup> *Wallis v. Soutter* [1915] W. N. (Eng.) 68, 59 Sol. Jo. 285, 8 B. W. C. C. 130.

<sup>79</sup> *Park v. Coltness Iron Co.* (1913) 50 Scot. L. R. 926, 2 Scot. L. T. 232, 6 B. W. C. C. 892.

<sup>80</sup> *Osborne v. Barclay* [1901] A. C. (Eng.) 269, 85 L. T. N. S. 286.

<sup>81</sup> *Proctor v. Cumisky* (1904) 6 Sc. Sess. Cas. 5th series, 832, 41 Scot. L. R. 636, 12 Scot. L. T. 172.



act, where he also lent a hand to other duties of a strictly agricultural character.<sup>82</sup> But the mere keeping of horses and cutting up hay for them by a hotel proprietor was not agricultural work within the meaning of the statute.<sup>83</sup> So, the work of a man hired by a saw miller to cut down trees and cart them to a saw-mill was not forestry.<sup>84</sup> A groom, looking after horses kept in stables in an inclosed yard, was not within the act, since the "land," as used in the act, means open land.<sup>85</sup>

The workman need not be on the premises owned by the employer to be within the protection of the act of 1900.<sup>86</sup>

### *XXIII. Employments to which the act of 1897 was applicable.*

#### *a. Text of § 7 of the act of 1897.*

As has been stated, the act of 1907 was restricted to certain employments which were enumerated in § 7. Although the provision is no longer in force in Great Britain, many of the colonial acts and of the American statutes are applicable only to the so-called extra-hazardous employments, and the cases construing this section of the earlier act will be of great value in arriving at the proper construction of those acts.

The text of § 7 was as follows:

(1) This act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on in or about any building which exceeds 30 feet in height and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2) In this act "railway" means the railway of any railway company to which the regulation of railways act 1873 applies, and includes a light railway made under the light railways act 1896; and "railway" and "railway company" have

the same meaning as in the said acts of 1873 and 1896; "factory" has the same meaning as in the factory and workshop acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the factory acts is applied by the factory and workshop act 1895, and every laundry worked by steam, water, or other mechanical power; "mine" means a mine to which the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, applies; "quarry" means a quarry under the quarries act 1894; "engineering work" means any work of construction or alteration or repair of a railroad, harbor, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water or other mechanical power is used; "undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof, within the meaning of the factory and workshop acts 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, as the case may be; in the case of an engineering work, means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition; "employer" includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer; "workman" includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependents, or other person to whom compensation is payable; "dependents" means (a)

<sup>82</sup> The county court judge may hold that the applicant was engaged in agricultural employment within the act, where the evidence showed that he acted as game keeper for three months in the year, but also lent a hand at hay harvest and at corn harvest, and made corn ricks and straw ricks, helped with the threshing, and did work like other laborers. *Smith v. Coles* [1905] 2 K. B. (Eng.) 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754.  
L.R.A.1916A.

<sup>83</sup> *Bolt v. Heywood* (1903; C. C.) 114 L. T. Jo. (Eng.) 294, 5 W. C. C. 151.

<sup>84</sup> *Meally v. M'Gowan* (1902) 4 Sc. Sess. Cas. 5th series, 883, 39 Scot. L. R. 662, 10 Scot. L. T. 145.

<sup>85</sup> *Grant v. Ward* (1904; C. C.) 7 W. C. C. (Eng.) 128.

<sup>86</sup> *Smithers v. Wallis* [1903] 1 K. B. (Eng.) 200, 72 L. J. K. B. N. S. 57, 67 J. P. 381, 51 Week. Rep. 261, 87 L. T. N. S. 556, 19 Times L. R. 111.

in England and Ireland, such members of the workman's family specified in the fatal accidents act 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and (b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

*b Scope and effect of these provisions in general.*

From the provisions above set out it will be seen that the right of the servant to recover compensation under the act was made to depend, in the majority of instances, upon two distinct tests, viz: (1) physical contiguity with respect to the locality in which one or other of certain specified classes of business are carried on; and (2) the character of the operations in which the servant is engaged. In any case in which the former of these tests is controlling, the essential subject of inquiry is the import of the phrase "on or in or about." The applicability of the latter test is a question which hinges upon the connotation of the various terms used to designate the various kinds of business which fall within the purview of the act.

*c. Meaning of the phrase "on or in or about."*

*1. In general.*

The phrase "on or in or about," con-

tained in § 7 of the act of 1897 (and which is also used in § 4, subsec. 4, in the act of 1906, with reference to compensation recoverable by servants of contractors), has been the subject of considerable controversy. The words "on" and "in" are not difficult or ambiguous, but the word "about" adds an element which has caused a considerable difference of opinion.

It certainly enlarges the application of the act,<sup>87</sup> and it has been spoken of as an "elastic word."<sup>88</sup> The phrase as a whole involves some idea of physical proximity,<sup>89</sup> and has reference to an area.<sup>90</sup> The limitation of the area is the point at issue in practically all of the cases in which the question has arisen.

Although the same meaning attaches to the phrase "on or in or about," used in connection with a factory, or with any of the other terms used in the statute,<sup>91</sup> it has nevertheless been deemed wise to group the cases construing this phrase according as they deal with a railroad, factory, or other place mentioned in the section.

*2. On, in or about a "railroad,"*

In England the accepted doctrine was that no part of the premises of a railway company can be regarded as being "used for purposes of public traffic," within the meaning of the regulation of railways act, unless some one of the processes directly connected with the operation of the trains was conducted thereon.<sup>92</sup> Another view prevailed in Scotland, a servant having been allowed to recover where the accident occurred in a city within the area of a yard where the horses used by a railroad company for collecting and delivering.

<sup>87</sup> In *Powell v. Brown* [1899] 1 Q. B. (Eng.) 157, 68 L. J. Q. B. N. S. 151, 47 Week. Rep. 145, 79 L. T. N. S. 631, 15 Times L. R. 65, it was held that the word "about" must be construed as enlarging the application of the statute over what it would have been had only the words "on or in" been used, and may embrace work done in close propinquity to the factory.

<sup>88</sup> *Fenn v. Miller* [1900] 1 Q. B. (Eng.) 788, 69 L. J. Q. B. N. S. 439, 82 L. T. N. S. 284, 16 Times L. R. 265, 2 W. C. C. 55, 64 J. P. 356, 48 Week. Rep. 369.

<sup>89</sup> *Rogers v. Cardiff Corp.* [1905] 2 K. B. (Eng.) 832, 75 L. J. K. B. N. S. 22, 93 L. T. N. S. 683, 22 Times L. R. 9, 8 W. C. C. 51, 54 Week. Rep. 35, 70 J. P. 9, 4 L. G. R. 1.

L.R.A.1916A.

<sup>90</sup> *Atkinson v. Lumb* [1903] 1 K. B. (Eng.) 861, 72 L. J. K. B. N. S. 460, 88 L. T. N. S. 789, 19 Times L. R. 412, 5 W. C. C. 106, 67 J. P. 414, 51 Week. Rep. 516.

<sup>91</sup> *Pattison v. White* (1904) 6 W. C. C. (Eng.) 61, 20 Times L. R. 775.

In *Back v. Dick* [1906] A. C. (Eng.) 325, 8 W. C. C. 40, Lord Robertson said: "It was not in the end disputed at the bar that this is so in the case of a factory, and the other things mentioned side by side with factories and 'engineering work,' to which, in common with 'engineering work,' the prepositions of locality 'in, on, or about' are made to apply."

<sup>92</sup> This doctrine was assumed to involve the consequence that no recovery could be had under the compensation act where



goods were shod,<sup>93</sup> and where the claimant was a carter whose business it was to deliver to consignees goods received at one of the stations of his employers, a railway company.<sup>94</sup> Of these two theories, the latter would seem to be the proper one. The English decision ignores the plain and literal meaning of the words "on or in or about," and fastens on them a restricted significance which is not justified by any of the language employed in the act itself.

An injury to a carter engaged in carting goods from a station, received when his horse bolted just outside the station, and dashed into a shop 315 yards away, did not occur "in or on or about" a railroad.<sup>95</sup> Nor can any compensation be recovered under the act where the conductor of a freight train met with an accident about three quarters of a mile from the main line of a railway from which a private siding belonging to a trading company diverged.<sup>96</sup>

the accident occurred in a railway refreshment room, when the only entrance for the public was from the station platform. *Milner v. Great Northern R. Co.* [1900] 1 Q. B. (Eng.) 795, 82 L. T. N. S. 187, 69 L. J. Q. B. N. S. 427, 64 J. P. 291, 48 Week. Rep. 387, 16 Times L. R. 249.

<sup>93</sup> *Caledonian R. Co. v. Breslin* (1900) 2 Sc. Sess. Cas. 5th series, 1158, 37 Scot. L. R. 873, 8 Scot. L. T. 125.

<sup>94</sup> *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

<sup>95</sup> *Bathgate v. Caledonian R. Co.* (1901) 4 Sc. Sess. Cas. 5th series, 313, 39 Scot. L. R. 246, 9 Scot. L. T. 334.

<sup>96</sup> *Brodie v. North British R. Co.* (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Scot. L. R. 38, 8 Scot. L. T. 248. With respect to this case it should be observed that the siding itself was not a "railway" for the purposes of the act, as it was not one to which the regulation of railways act 1873, referred to in § 7, subsec. 2, was applicable.

<sup>97</sup> Recovery has been allowed where an employee was injured while loading a cart belonging to the owners of the factory, standing in a street close to the entrance to the factory yard, in a place where it was usually loaded. *Powell v. Brown* [1899] 1 Q. B. (Eng.) 157, 68 L. J. Q. B. N. S. 151, 79 L. T. N. S. 631, 47 Week. Rep. 145, 15 Times L. R. 65.

And where a workman employed as a quay laborer at a wharf was injured on the street outside the wharf shed, while engaged in removing girders to the side of a steamer. *Strain v. Sloan* (1901) 3 Sc. Sess. Cas. 5th series, 663, 38 Scot. L. R. 475, 8 Scot. L. T. 498.

In a case where a railway carter was injured while taking goods from a factory to a dray, in which they were to be conveyed to the station of a railway, it was L.R.A.1916A.

### 3. — a "factory."

A workman may be employed "on or in or about" a factory, although he is on the street adjoining the factory, if the work he is performing is a part of the factory business.<sup>97</sup> And also where he was employed in a building adjoining the factory proper, although at some distance from it.<sup>98</sup> But where a workman engaged to cart material to or from a factory is injured while upon the road and at some distance from the factory, it has been held in several cases that he is not injured "in or on or about" the factory.<sup>99</sup> And an employee in a factory, whose duty in part it was to take goods from the factory to a railroad station, is not employed "in or on or about" the factory while at the railroad station.<sup>1</sup> Under the Nova Scotia act, the term "plant" includes teams which are used for the delivery of the output of the factory.<sup>2</sup>

An employee at work on a gas main

held that the owners of the factory were "undertakers," and that the accident occurred while the carter was employed "in or about" the factory. *McGovern v. Cooper* (1901) 4 Sc. Sess. Cas. 5th series 249, 39 Scot. L. R. 102, 9 Scot. L. T. 270.

<sup>98</sup> As where a car driver of a cable railway company was injured, while oiling his car in the car shed, 374 feet distant from a machine room adjoining the shed in which grips and other parts of the cars were repaired. *Mooney v. Edinburgh & D. Tramways Co.* (1901) 4 Sc. Sess. Cas. 5th series, 390, 38 Scot. L. R. 260, 9 Scot. L. T. 366.

<sup>99</sup> Recovery has been disallowed where a carter, employed by the occupiers of a factory to cart goods to and from the factory, was injured when he was about a mile and a half distant from the factory. *Lowth v. Ibbotson* [1899] 1 Q. B. (Eng.) 1003, 80 L. T. N. S. 341, 68 L. J. Q. B. N. S. 465, 47 Week. Rep. 506, 15 Times L. R. 264.

And where a cart used to carry timber from a factory upset about 2 miles away from the factory, and injured an employee. *Bell v. Whitton* (1899) 1 Sc. Sess. Cas. 5th series, 942, 36 Scot. L. R. 754, 7 Scot. L. T. 59.

And where a laborer, whose duty it was to fetch water in a cart from a brook at some distance along the main road, for the use of a factory, was injured while returning with the cart, at a spot about 110 to 160 yards distant from the engine and mortar-mill, owing to the horse running away. *Fenn v. Miller* [1900] 1 Q. B. (Eng.) 788, 82 L. T. N. S. 284, 69 L. J. Q. B. N. S. 439, 64 J. P. 356, 48 Week. Rep. 369, 16 Times L. R. 265.

<sup>1</sup> *Spencer v. Harrison* (1908; C. C.) 1 B. W. C. C. (Eng.) 76.

<sup>2</sup> In *O'Toole v. Brandram-Henderson* (1915) 48 N. S. 293, it was held that the dependents of a teamster who was killed while

a quarter of a mile from the gas works is not at work "on or in or about a factory."<sup>3</sup>

No compensation is recoverable where the workman was injured in the employment of a firm of ship repairers, while repairing a ship in a public dock at a distance from his employer's factory of 550 yards in a direct line, and about a mile by road.<sup>4</sup>

A workman at work in a shed situated about half a mile from the defenders' works, and having no direct connection therewith by rail, and no steam, water, or other mechanical power being used therein, is not employed "on or in or about" the defenders' factory, and is not entitled to compensation for injuries while so engaged.<sup>5</sup>

The expression "employment by the undertakers . . . on or in or about a . . . factory" has been held to mean employment by the undertakers on, in, or about their own factory.<sup>6</sup>

#### 4. — a "mine."

A workman is employed "in or on or

drawing the product of a factory at some distance from the factory are entitled to compensation, since the team and truck which he was driving must be considered as a part of the employer's plant, and the fact that he was, at the time of the injury, at a considerable distance away from the factory proper, does not deprive such dependents of the right to compensation.

<sup>3</sup> *Spacey v. Dowlais Gas & Coke Co.* [1905] 2 K. B. (Eng.) 879, 75 L. J. K. B. N. S. 5, 93 L. T. N. S. 685, 22 Times L. R. 29, 54 Week. Rep. 138.

<sup>4</sup> *Barclay v. McKinnon* (1901) 3 Sc. Sess. Cas. 5th series, 436, 38 Scot. L. R. 321, 8 Scot. L. T. 404, appeal dismissed on question of jurisdiction in [1901] A. C. (Eng.) 269, 85 L. T. N. S. 286, 4 W. C. C. 149.

<sup>5</sup> *Ferguson v. Barclay Sons & Coy* (1902) 5 Sc. Sess. Cas. 5th series, 105, 40 Scot. L. R. 58, 10 Scot. L. T. 350.

<sup>6</sup> A workman, therefore, who is sent by his employers on their business to the factory of a third person, and is there injured by accident, is not entitled to compensation under the act. *Francis v. Turner Bros.* [1900] 1 Q. B. (Eng.) 478, 69 L. J. Q. B. N. S. 182, 81 L. T. N. S. 770, 16 Times L. R. 105, 2 W. C. C. 61, 64 J. P. 53, 48 Week. Rep. 228; *Wrigley v. Whittaker* [1902] A. C. (Eng.) 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

<sup>7</sup> Recovery has been allowed where a servant was injured while engaged in blasting boulders, for the purpose of forming a road to be used in the operation of a mine which was being opened a few yards away. *Ellison v. Longden* (1901) 18 Times L. R. (Eng.) 48.

And where a brakeman in the service of L.R.A.1916A.

about" a mine where he, although not in the mine, is doing work connected therewith and only a short distance away.<sup>7</sup> In one case it was expressly held that an accident did not occur in or on or about a mine, because it occurred three fourths of a mile from the mine.<sup>8</sup> In another case, a distance of 400 yards was sufficient to take the workman out of the protection of the statute, where a portion of the property occupying such space did not belong to the mine owner.<sup>9</sup>

Where an injury was received by a workman who, after the conclusion of his day's work, was walking home along a private railway belonging to his employer, and was run over at a point about 230 yards from the place where he was working, compensation was denied.<sup>10</sup>

#### 5. — "engineering work."

The phrase "engineering work" indicates locality the same as the other words used in the same connection,—rail-

a colliery company was injured while coupling cars on a siding belonging to the company. *Monaghan v. United Collieries* (1900) 3 Sc. Sess. Cas. 5th series, 149, 38 Scot. L. R. 92, 8 Scot. L. T. 261.

An employee engaged in screening tailings in a tailings area which was located about three-quarters of a mile from the mining lease is "employed in or about a mine." *Taylor v. The Cecil Syndicate* (1906) *Queensl. St. Rep.* 324.

A drum-house and sidings on a private line of railroad which connects the mine with a main line of railroad is on or in or about a "mine," although located at a distance of 800 yards from the mine. *Ander-son v. Lochgelly Iron & Coal Co.* (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 187.

<sup>8</sup> Recovery has been disallowed where an engine driver in the employ of colliery owners was killed about  $\frac{3}{4}$  of a mile from the pit mouth of the colliery, while his engine was drawing a coal train to the depot where the coal was stored. *Turnbull v. Lambton Collieries Co.* (1900) 82 L. T. N. S. (Eng.) 589, 16 Times L. R. 369, 64 J. P. 404.

<sup>9</sup> A workman employed as a carter at a coal mine, who sustained fatal injuries while transferring timber to a colliery cart from a railway wagon at a railway siding belonging to and in the occupation of a railway company, at a distance of about 400 yards from the pit,—the distance being made up of (1) railway siding (123 yards), (2) the breadth of a public road, and (3) a private cart road leading to the pit (259 yards) —, was not injured in the course of employment "on or in or about a mine." *Coylton Coal Co. v. Davidson* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 727.

<sup>10</sup> *Caton v. Summerlee & M. Iron & Coal*



way, factory, mine, and quarry.<sup>11</sup> To come within the statute, the workman must be, at the time of the accident, "on or in or about" the locality of the engineering work.<sup>12</sup>

A piece of vacant land adjoining a street, which was being used for preparing materials for constructing a street, is "on or in or about" the street.<sup>13</sup>

The driver of a tower wagon used to repair a tramway is on, in, or about engineering work while driving from a place where repairs had been made to another place where repairs were also wanted.<sup>14</sup>

**6. —"premises on which principal has undertaken to execute the work."**

A workman employed by a subcontractor to cart away rubbish from where a street is being paved is not injured "on or in or about the premises on which the principal had undertaken to execute the work," where he falls from his cart 2 miles from the scene of the paving operation.<sup>15</sup>

Co. (1902) 4 Sc. Sess. Cas. 5th series, 989, 39 Scot. L. R. 762, 10 Scot. L. T. 204.

<sup>11</sup> It is a thing which embraces a certain physical area. *Atkinson v. Lumb* [1903] 1 K. B. (Eng.) 861, 72 L. J. K. B. N. S. 460, 88 L. T. N. S. 789, 19 Times L. R. 412, 5 W. C. C. 108, 67 J. P. 414, 51 Week. Rep. 516.

It has no structural boundary, but it has geographical boundary. *Back v. Dick* [1906] A. C. (Eng.) 325, 75 L. J. K. B. N. S. 569, 94 L. T. N. S. 802, 8 W. C. C. 40, 22 Times L. R. 548.

<sup>12</sup> No recovery is allowable in respect of an accident which occurred to a workman while he was engaged in unloading from a hopper, amount 1½ miles out at sea, mud dredged from a harbor, notwithstanding that he was at times employed on the dredger. *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. (Eng.) 132, 68 L. J. Q. B. N. S. 740, 80 L. T. N. S. 586, 47 Week. Rep. 533, 15 Times L. R. 341, 1 W. C. C. 47.

A workman employed by a subcontractor to cart sand for the construction of a railway, who was injured at a point 2½ miles from the works, is not injured "on or in or about" engineering work. *Pattison v. White* (1904) 20 Times L. R. (Eng.) 775, 6 W. C. C. 61.

No compensation can be recovered for an injury received in unloading and stacking rails in a yard which was 700 yards distant from the place where the old rails were being torn up and new ones laid. *Back v. Dick* (Eng.) *supra*.

A workman engaged in the erection of gas engines for generating electricity for, among other purposes, a shipbuilding yard, at a distance of 150 yards from where docks were being constructed, was not engaged on, L.R.A.1916A.

**d. Buildings being constructed or repaired or demolished by means of a scaffolding.**

**1. What is a "building."**

A platform built to carry and support a steam train used in the erection of a permanent structure is a "building" within the act.<sup>16</sup>

The mere fact that a building is more than 30 feet in height and that more than 20 persons other than domestic servants are employed therein, does not make such a building a factory within the compensation act.<sup>17</sup>

**2. Height of building.**

In an arbitration before the county court under this act, the question whether a building "exceeds 30 feet in height," within the meaning of this section, is a question of fact to be determined by the county court judge, having regard to the particular circumstances existing at the time of the accident to the workman.<sup>18</sup> The conditions indicated by this phrase

in, or about an engineering work. *Rimmer v. Premier Gas Engine Co.* (1907) 97 L. T. N. S. (Eng.) 226, 23 Times L. R. 610, 9 W. C. C. 56. Sir Gorell Barnes, P., said: "In my opinion it is impossible to hold that a place which was used to supply electrical energy for a multitude of purposes can be held to be part of a dock because one of those purposes was the supply of power for the dock."

<sup>13</sup> *Lord v. Turner* (1902; C. C.) 114 L. T. Jo. (Eng.) 133, 5 W. C. C. 87.

<sup>14</sup> *Rogers v. Cardiff Corp.* [1905] 2 K. B. (Eng.) 832, 75 L. J. K. B. N. S. 22, 93 L. T. N. S. 623, 22 Times L. R. 9, 8 W. C. C. 51, 54 Week. Rep. 35, 70 J. P. 9, 4 L. G. R. 1.

<sup>15</sup> *Andrews v. Andrews* [1908] 2 K. B. (Eng.) 567, 77 L. J. K. B. N. S. 974, 99 L. T. N. S. 214, 24 Times L. R. 709. This case arose under § 4, subsec. 4, of the act of 1906.

<sup>16</sup> *Aylward v. Matthews* [1905] 1 K. B. (Eng.) 343, 74 L. J. K. B. N. S. 336, 53 Week. Rep. 518, 88 L. T. N. S. 671, 19 Times L. R. 196.

<sup>17</sup> *Dyer v. Swift Cycle Co.* [1904] 2 K. B. (Eng.) 36, 73 L. J. K. B. N. S. 566, 68 J. P. 394, 52 Week. Rep. 483, 90 L. T. N. S. 613, 20 Times L. R. 429 (building used for bicycle salesroom; no mechanical power of any kind used).

<sup>18</sup> *McGrath v. Neill* [1902] 1 K. B. (Eng.) 211, 71 L. J. K. B. N. S. 58, 66 J. P. 180, 50 Week. Rep. 162, 18 Times L. R. 36, approving a finding that the building was over 30 feet in height, where the judge took the lowest part of the footings as the level from which to estimate the height, and there was no evidence to show that, at the time, anything more than the footings had been covered in.

are satisfied where the height of the building, without including the foundation, is more than 30 feet.<sup>19</sup> The distance from the ground to the top of the roof, and not the distance from the ground to the top of the walls, is to be considered in determining whether a building is more than 30 feet high, within the act.<sup>20</sup>

Workmen on an addition to a building which is over 30 feet high were within the protection of the act, although the addition was not then of that height.<sup>21</sup> So a finding that the employment of the workman was upon a building exceeding 30 feet in height, being demolished, is justified where the evidence shows that, although the building had been reduced to less than 30 feet, the party wall between the building and the adjoining one remained intact at the time of the accident, and was more than 30 feet in height.<sup>22</sup> But a workman engaged in demolishing a building less than 30 feet in height is not within the statute, although it adjoins and is connected with

another building which is more than 30 feet in height.<sup>23</sup>

If a building in the process of erection has not reached the height of 30 feet, it is not within the statute, although when completed it will exceed that height.<sup>24</sup>

The height of the building is immaterial where it is one "in which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof."<sup>25</sup>

### 3. "Being constructed or repaired."

These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed and believed to be complete, but, having been afterwards thought to be faulty and unstable, is being strengthened by the addition of stays or supports.<sup>26</sup>

The word "repair" includes painting, whitewashing, and dubbing the ceiling

A depression or sunken bed 6 feet deep in which a condenser is to stand, connected by pipes to a boiler house, the chimney to which is 70 feet high, is a part of a building over 30 feet in height. *McGregor v. Wright* (1901; C. C.) 3 W. C. C. (Eng.) 121.

In *Silvester v. Cude* (1899) 15 Times L. R. (Eng.) 434, 1 W. C. C. 120, the action of the county court judge in refusing to permit the respondent to offer evidence to show that the building was not 30 feet in height was sustained upon the ground that he had failed to answer.

<sup>19</sup> *Halstead v. Thomson* (1901) 3 Sc. Sess. Cas. 5th series, 668, 38 Scot. L. R. 473.

<sup>20</sup> *Hoddinott v. Newton* [1899] 1 Q. B. (Eng.) 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299, affirmed as to this point in [1901] A. C. 49, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 84 L. T. N. S. 1, 17 Times L. R. 134.

<sup>21</sup> *Hartley v. Quick* [1905] 1 K. B. (Eng.) 359, 74 L. J. K. B. N. S. 257, 92 L. T. N. S. 191, 21 Times L. R. 207.

<sup>22</sup> *Knight v. Cubitt* [1902] 1 K. B. (Eng.) 31, 71 L. J. K. B. N. S. 65, 50 Week. Rep. 113, 18 Times L. R. 26, 66 J. P. 52, 85 L. T. N. S. 526.

<sup>23</sup> Internal communication between a building over 30 feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher, and that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding 30 feet in height. *Rixsom v. Pritchard* [1900] 1 Q. B. (Eng.) 800, 82 L. T. N. S. 186, 69 L.R.A.1916A.

L. J. Q. B. N. S. 494, 16 Times L. R. 250.

<sup>24</sup> An accident to a workman employed on, in, or about a building in the course of construction, which does not at the time exceed 30 feet in height, although it is intended that when completed it shall exceed such height, is not within the act. *Billings v. Holloway* [1899] 1 Q. B. (Eng.) 70, 68 L. J. Q. B. N. S. 16, 79 L. T. N. S. 396, 47 Week. Rep. 105, 15 Times L. R. 53.

<sup>25</sup> *Mellor v. Tomkinson* [1899] 1 Q. B. (Eng.) 374, 68 L. J. Q. B. N. S. 214, 79 L. T. N. S. 715, 63 J. P. 55, 47 Week. Rep. 240, 15 Times L. R. 142; *Murnin v. Calderwood* (1899) 1 Sc. Sess. Cas. 5th series, 862, 36 Scot. L. R. 648, 7 Scot. L. T. 16.

<sup>26</sup> In *Hoddinott v. Newton* [1901] A. C. (Eng.) 49, reversing [1899] 1 Q. B. 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299, Lord Macnaghten said: "Construction, repair, demolition,—these three operations cover, I think, every varying phase in the life of a building, from its beginning to its end." Lord Morris said: "In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing,—alteration in its construction is, in my opinion, constructing. . . . In my opinion, whether completed or not completed, if work of the nature of construction goes on, that is constructing, and if work in the nature of repair, that is repairing; and there is no room for any third operation of so-called alteration as distinct from constructing or repairing." Lords Shand and Lindley dissented from the judgment of the majority.



and walls of the interior of a building, where the painting and whitewashing is a portion of the work necessary to finish the building.<sup>27</sup>

On the ground that the building in question came within the descriptive words, "being constructed by a scaffolding," recovery has been allowed in a case where, at the time of the accident, the component parts of the scaffolding were lying on the ground ready for use, but the scaffolding itself had not been erected,<sup>28</sup> and where the building itself had been completed, but the scaffolding was still standing.<sup>29</sup> So recovery was allowed where an employee of a plumbing contractor was sent to measure up the plumbing after that work had been com-

pleted, although the building was still being constructed "by means of a scaffold."<sup>30</sup>

#### 4. What is a "scaffolding."

It is now definitely settled that the word "scaffolding" is not restricted to those permanent external structures to which the word is most commonly applied, but also embraces an internal staging, arranged by means of planks and trestles and without poles.<sup>31</sup> Whether a mere temporary staging of this kind is a scaffolding is a mixed question of law and fact. When the facts are ascertained it is a question of law, upon which a court of review is not only entitled, but bound, to express an opinion.<sup>32</sup>

<sup>27</sup> Reddy v. Broderick [1901] 2 I. R. (Ir.) 328.

Whitewashing work being done upon a school building more than 30 feet high, by means of a scaffolding, when a workman employed upon the work was killed owing to the collapse of the scaffolding, is repair work. *Dredge v. Conway* [1901] 2 K. B. (Eng.) 42, 84 L. T. N. S. 345, 70 L. J. Q. B. N. S. 494, 49 Week. Rep. 518, 17 Times L. R. 355.

The court stated that the effect of the decision in *Hoddinott v. Newton* [1901] A. C. (Eng.) 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, supra, was to overrule the earlier ruling (*Wood v. Walsh* [1899] 1 Q. B. (Eng.) 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 15 Times L. R. 279) that the ordinary outside painting of a building is not "repair" within the meaning of the act.

Decorating a church by means of stencils is "repairing," where the stenciling was a part of the general scheme for restoring the church. *Hardy v. Moss* (1904; C. C.) 116 L. T. Jo. (Eng.) 201, 6 W. C. C. 68.

<sup>28</sup> *Halstead v. Thomson* (1901) 3 Sc. Sess. Cas. 5th series (Scot.) 668. The special consideration on which the court relied was that "the scaffolding was regularly used from time to time by all the tradesmen engaged in the work during the construction of the building, both prior and subsequently to the accident."

<sup>29</sup> A builder erected a scaffolding for the purpose of raising building materials from a lower level to the higher level on which the building which he was constructing stood. After the building was complete, and while it was in actual use, a workman was injured as he was removing gear from his scaffolding. Held, that the workman was employed on a building which was "being constructed" by means of a scaffolding. *Frid v. Fenton* (1900) 82 L. T. N. S. (Eng.) 193, 69 L. J. Q. B. N. S. 437, 16 Times L. R. 267.

So, in *McCabe v. Jopling* [1904] 1 K. B. (Eng.) 222, 73 L. J. K. B. N. S. 129, 89 L. T. N. S. 624, 20 Times L. R. 119, 52 L.R.A.1916A.

*Week. Rep.* 358, 68 J. P. 121, it was held that a work of repair was not completed until the scaffolding was removed, and that an employee engaged in the work of removing the scaffold was within the purview of the statute.

<sup>30</sup> *Plant v. Wright* [1905] 1 K. B. (Eng.) 353, 74 L. J. K. B. N. S. 331, 53 Week. Rep. 358, 92 L. T. N. S. 720, 21 Times L. R. 217.

<sup>31</sup> *Hoddinott v. Newton* [1901] A. C. (Eng.) 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, reversing [1899] 1 Q. B. 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299.

<sup>32</sup> *Hoddinott v. Newton* [1901] A. C. (Eng.) 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, per Lord Macnaghten.

A new house more than 30 feet high had been roofed in, and workmen employed by the builder were plastering the walls and ceilings inside the house, for which purpose trestles and boards were being used. One of the men, while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, and was killed. At that time other workmen were at work plastering some of the rooms, and were standing on boards placed across trestles 4 feet high, in order to enable them to reach the ceilings and upper part of the walls. It was held that there was evidence to justify a finding of the county judge that such arrangement of trestles and boards was a "scaffolding." *Maude v. Brook* [1900] 1 Q. B. (Eng.) 575, 69 L. J. Q. B. N. S. 322, 64 J. P. 181, 48 Week. Rep. 290, 82 L. T. N. S. 39, 16 Times L. R. 164. Collins, L. J., dissented, being of opinion that the word "scaffolding" ought to be construed in its ordinary popular meaning, taken in connection with its context, and that it meant some structure of planks and supports capable of being used for the construction or repair of a building over 30 feet in height.

A new house more than 30 feet high had been roofed in and the external scaffolding removed. The applicant was engaged in

The cases dealing with the question whether a ladder is a "scaffolding" within the meaning of the act are conflicting. In some cases it has been held to be a conclusion of law that a ladder used in the ordinary way is not embraced in the word "scaffolding."<sup>33</sup> But what appears to have become the settled rule is that whether a ladder is a scaffolding within the meaning of the act is a ques-

tion of fact, and ordinarily the finding of the arbitrator will not be disturbed.<sup>34</sup> So the court of appeal refused to disturb a finding that painters' steps came within the terms of the act.<sup>35</sup>

A finding that a "crawling board" used in the repair of a roof was scaffolding was held not to be improper.<sup>36</sup>

It is not necessary that the scaffold shall be put up by the undertaker; it is

plastering the walls and ceiling in one of the rooms, and in order to reach his work was standing on a structure of trestles, with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county court judge decided that the structure was not a scaffolding, and refused to make an award of compensation, but referred the matter to the court judge, who reversed the decision of the arbitrator and awarded the compensation provisionally settled by the arbitrator. On appeal it was held that the question whether the structure was a scaffolding or not was a question for the arbitrator, and that his finding was not open to review. *Ferguson v. Green* [1901] 1 K. B. (Eng.) 25, 70 L. J. K. B. N. S. 21, 64 J. P. 819, 49 Week. Rep. 105, 83 L. T. N. S. 461, 17 Times L. R. 41.

The word "scaffolding" includes an internal staging formed by planks resting on the step of a ladder and upon one of the roof principals in the center of a room. *Reddy v. Broderick* [1901] 2 I. R. (Ir.) 328.

Planks over a sunken bed 6 feet deep and used to wheel barrows upon is a scaffolding. *McGregor v. Wright* (1901; C. C.) 3 W. C. C. (Eng.) 121.

Two pairs of trestles with planks resting on them do not constitute a scaffolding. *Stack v. Counsell Bros.* (1899; C. C.) 106 L. T. Jo. (Eng.) 342, 1 W. C. C. 133.

<sup>33</sup> *Wood v. Walsh* [1899] 1 Q. B. (Eng.) 1009, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 80 L. T. N. S. 345, 15 Times L. R. 279; *McDonald v. Hobbs* (1899) 2 Sc. Sess. Cas. 5th series, 3, 37 Scot. L. R. 4, 7 Scot. L. T. 157, 36 Scot. L. R. 393; *Campbell v. Sellars* (1903) 5 Sc. Sess. Cas. 5th series, 900, 40 Scot. L. R. 643, 11 Scot. L. T. 89 (no evidence that ladder was used other than in the ordinary way).

<sup>34</sup> *Veazey v. Chattle* [1902] 1 K. B. (Eng.) 494, Collins, M. R., remarked: "A ladder might be—at any rate I cannot say that it could not be—a scaffolding; and it would make no difference whether it were high above ground on the roof of a house, or whether it were resting on the ground."

In one case the finding of the county court judge that a ladder used in white-washing by placing it against the building, and the workmen sitting or standing on the rungs, was not a scaffolding, was held binding on the court of appeal. *Crowther v. West Riding Window Cleaning Co.* [1904] L.R.A.1916A.

1 K. B. (Eng.) 232, 73 L. J. K. B. N. S. 71, 68 J. P. 122, 52 Week. Rep. 374.

In another the court of appeal refused to disturb a finding to the effect that a ladder placed so that one end rested on the ground and the other against the parapet of a house was not a "scaffolding." *Marshall v. Rudeforth* [1902] 2 K. B. (Eng.) 175, 71 L. J. K. B. N. S. 781, 66 J. P. 627, 50 Week. Rep. 596, 86 L. T. N. S. 752, 18 Times L. R. 649.

On the other hand, in *O'Brien v. Dobbie* [1905] 1 K. B. (Eng.) 346, the finding that a ladder upon which a workman was standing to do some work was a scaffolding was upheld. Mathew, L. J., said: "It [the ladder] was put to answer the purposes that might be secured by a scaffolding, because the workmen did not have recourse to it merely to pass up and down; but it was put there, and intended to be used there, and was used there, as a support for the workman at a certain height from the ground to enable him to do part of the work that he had to do. Under those circumstances it seems to me that there is nothing in the cases that have been decided which precludes us from taking the view that there was evidence before the learned arbitrator that this structure was not being used merely as a ladder, but was being used for the additional purpose of affording support to the workman. I consider the question was one for him. It was first a question of fact, and, when the facts had been ascertained, there is no rule of law which precluded him from coming to the conclusion at which he arrived."

<sup>35</sup> *Elvin v. Woodward* [1903] 1 K. B. (Eng.) 838, 72 L. J. K. B. N. S. 468, 67 J. P. 413, 51 Week. Rep. 518, 88 L. T. N. S. 671, 19 Times L. R. 410.

<sup>36</sup> *Veazey v. Chattle* [1902] 1 K. B. (Eng.) 494, 71 L. J. K. B. N. S. 252, 66 J. P. 389, 50 Week. Rep. 263, 85 L. T. N. S. 574, 18 Times L. R. 99 (Stirling, L. J., dissenting). The crawling board, a contrivance ordinarily used in the repair of roofs, consisting of a wooden plank about 18 to 20 feet long and 10 inches wide, across which were nailed transverse pieces of wood to give support to the man while working upon it; on the under side at one end was fastened a cross piece of wood, which fitted over the ridge of the roof and kept the board in position. At the time of the accident the workman was on the roof fixing the crawling board, while the lower end of the board was being steadied by an assistant standing on the ladder.



sufficient that the building is being constructed by means of a scaffold.<sup>37</sup>

The result of the decisions as a whole is manifestly to bring within the purview of the act some classes of structures which are assuredly not scaffolds in the sense in which that term is ordinarily employed when it is applied to a contrivance for facilitating the erection of a building. The result of the decisions involves the curious result that a workman who, when working in a house exceeding 30 feet in height, falls from a low temporary platform erected in a room where the floor is completely finished, where he is in no greater danger than if he were on a similar platform in a completed house, may recover compensation, while, on the other hand, no compensation is recoverable by a servant who, while working on a house less than 30 feet in height, falls from a platform resting on the ground, which subjects him to a much greater danger.

It would not seem to be improbable, to say the least, that the legislature really intended to confine the statutory right of compensation to cases in which the cause of the accident is the scaffolding, which is of such a height and such a construction that the workmen on it are exposed to the danger of falling 30 feet or more.

#### *e. Meaning of "railroad."*

Private railways, not being "used for purposes of public traffic," are not covered by the compensation act, although they may be connected with a public railway.<sup>38</sup>

A tramway laid along a public road is a "railroad."<sup>39</sup>

The word "railroad" is used in the

same comprehensive sense as the word "railway," and is not restricted to the permanent way merely.<sup>40</sup>

#### *f. — of "factory."*

##### *1. In general.*

As appears from the text of the compensation act of 1897, set out above, the provisions of the factory act from 1878-1891 were practically incorporated in the former act; but as these acts are of considerable length and include many provisions not relevant to the act under discussion, it has been deemed wise not to include the text of these acts. The descriptive terms used therein to define a factory, which have been construed in connection with the awarding of compensation, are sufficiently set out in the titles to the following subdivision.

The factory in question is the factory of the employer, and not one belonging to a third person to which the workman has been sent to do some work for his employer.<sup>41</sup>

##### *2. "Premises wherein steam, water, or other mechanical power is used in aid of the manufacturing process."*

With reference to these descriptive words it has been held that a yard in which stones are dressed by manual labor, and in which there is an engine house in which the workmen's tools are sharpened, is a "nontextile factory;"<sup>42</sup> an employee engaged in repairing a hydraulic lift is within the act, although the "machinery driven by steam, water, or other mechanical power" is the lift itself.<sup>43</sup> But a gas main used to supply gas to the consumers is not a part of a factory.<sup>44</sup> And the preliminary washing

<sup>37</sup> Fletcher v. Hawley (1905) 21 Times L. R. (Eng.) 191.

<sup>38</sup> The word "railway" is not applicable to a siding in a dockyard, constructed merely as an adjunct to the ordinary business of the proprietors of the dockyard. London & I. Docks Co. v. Midland R. Co. 18 Times L. R. (Eng.) 171, 71 L. J. K. B. N. S. 153, 86 L. T. N. S. 29, reversed in [1902] 1 K. B. 568, 18 Times L. R. 325, 71 L. J. K. B. N. S. 369, 50 Week. Rep. 461, 86 L. T. N. S. 339. Nor to a private siding belonging to a trading company which does business with the railway company. Brodie v. North British R. Co. (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Scot. L. R. 38, 8 Scot. L. T. 248.

<sup>39</sup> Fletcher v. London United Tramways [1902] 2 K. B. (Eng.) 269, 71 L. J. K. B. N. S. 653, 66 J. P. 596, 50 Week. Rep. 597, 86 L. T. N. S. 700, 18 Times L. R. 639.

<sup>40</sup> Fullick v. Evans (1901) 84 L. T. N. S. (Eng.) 413, 17 Times L. R. 346, holding L.R.A.1916A.

that, where a workman was accidentally injured in the course of his employment on the construction of a signal box on a new line of railway, his employment was on, in, or about a work of construction of a "railroad."

<sup>41</sup> Francis v. Turner Bros. [1900] 1 Q. B. (Eng.) 478, 69 L. J. Q. B. N. S. 182, 81 L. T. N. S. 770, 48 Week. Rep. 228, 64 J. P. 53, 16 Times L. R. 105, 2 W. C. C. 61; Wrigley v. Whittaker [1902] A. C. (Eng.) 299, 71 L. J. K. B. N. S. 600, 86 L. T. N. S. 775, 18 Times L. R. 559, 50 Week. Rep. 656, 66 J. P. 420, 4 W. C. C. 93.

See also the cases cited post, 209.

<sup>42</sup> Weir v. Petrie (1900) 2 Sc. Sess. Cas. 5th series, 1041, 37 Scot. L. R. 795, 8 Scot. L. T. 75.

<sup>43</sup> Tullock v. Waygood [1906] 2 K. B. (Eng.) 261, 75 L. J. K. B. N. S. 557, 95 L. T. N. S. 223.

<sup>44</sup> Spacey v. Dowlais Gas & Coke Co. [1905] 2 K. B. (Eng.) 879, 22 Times L. R.

of bottles by a rotary brush driven by a small gas engine is not a process used "in aid of" the bottling, and consequently that a place where such work is carried on is not within the purview of the act.<sup>45</sup> Nor can the expressions in question be so construed as to bring within the category of "factories" a threshing machine and traction engine, which, at the time of the accident, were in transit to a place where they were to be used for threshing, the engine being connected with the machine for no purpose but that of hauling.<sup>46</sup>

A theater in which hydraulic machinery is used to raise and lower a portion of the stage is not a factory, since the mechanical power is not used in the aid of a manufacturing process.<sup>47</sup> Steam power being used to cut hay and straw is not used in the aid of any manufacturing process.<sup>48</sup>

Horse power is not a mechanical power within the meaning of the statute;<sup>49</sup> nor is hand power, so that premises in which such power is used are not for that reason alone a factory.<sup>50</sup> Blocks and a

winch operated by hand power are not within the statute;<sup>51</sup> nor is a pulley operated by hand power.<sup>52</sup>

The plaintiff was not engaged "in or about" a factory, where he was injured in a shed which was about a half a mile away from his employer's factory, and in which no mechanical power was used.<sup>53</sup>

### 3. Iron mills.

A farrier's forge and shop, at which a large number of horseshoes are kept for use in shoeing horses, is not an "iron mill" merely because the shoes have to be hardened before being used.<sup>54</sup>

### 4. "*Premises wherein . . . any manual labor is exercised by way of trade or for purposes of gain.*"

With reference to these words as used in the clause in which a "nontextile factory" is defined, it has been held that this term is applicable to the refuse despatch works of a city, where the salable parts of the city refuse are separated from the unsalable part by processes in which steam power is used,<sup>55</sup> and to a

29, 75 L. J. K. B. N. S. 5, 54 Week. Rep. 138, 93 L. T. N. S. 685, 8 W. C. C. 29. Romer, M. R., said: "The business of the gas company included both the manufacture and the supply of gas, and no doubt gas mains are practically a necessity for the business of supplying gas to consumers; but the use of mains for delivering the gas does not make them part of the place where the gas is manufactured."

<sup>45</sup> Law v. Graham [1901] 2 K. B. (Eng.) 327 (decided with reference to the definition in § 93 of the repealed factory and workshop act 1878). In the course of the opinion it was said: "I am of opinion that, having regard to the earlier part of § 93, and to the provisions with respect to manufacturing processes, and to the 4th schedule, the washing of the bottles by mechanical means cannot be fairly called a process which is used 'in aid of' the bottling of the beer. It is true that the bottles must be clean, and the respondents wash them because they are going to put beer into them; but, in my opinion, that operation is not 'in aid of' in the sense in which those words are used in the section. Therefore, though the case is near the line, I think the justices were right. With regard to Weir v. Petrie (Scot.) supra, I do not wish to be thought to dissent from that decision, because there, in a sense, the actual condition of the tools might have a great deal to do with the dressing of the stone for sale. Whether or not I should have decided the case the same way I need not now consider; but I do not, in what I have said, intend to dissent from the decision, because I think L.R.A.1916A.

a distinction may be drawn between it and the case now before us."

<sup>46</sup> George v. Macdonald (1901) 4 Sc. Sess. Cas. 5th series, 190, 39 Scot. L. R. 136, 9 Scot. L. T. 267.

<sup>47</sup> Burnett v. Drury Lane Theatre (1902) 4 W. C. C. (Eng.) 56.

<sup>48</sup> Employment on a chaff cutting machine which was run by a steam engine and let out to farmers is not within the act, since such a machine is not a factory, nor is the operation of it an engineering work. Watkinson v. Crouch (1899; C. C.) 107 L. T. Jo. (Eng.) 328, 1 W. C. C. 137.

<sup>49</sup> Bolt v. Heywood (1903; C. C.) 114 L. T. Jo. (Eng.) 294, 5 W. C. C. 151.

<sup>50</sup> Willmott v. Paton [1902] 1 K. B. (Eng.) 237, 71 L. J. K. B. N. S. 1, 66 J. P. 197, 50 Week. Rep. 148, 85 L. T. N. S. 569, 18 Times L. R. 48, 4 W. C. C. 65.

<sup>51</sup> Putting a fly wheel onto an engine by means of blocks and a winch operated by hand power does not fall within the statute. Wrigley v. Bagley [1901] 1 Q. B. (Eng.) 780, 70 L. J. K. B. N. S. 538, 84 L. T. N. S. 415, 3 W. C. C. 61, 49 Week. Rep. 472, 65 J. P. 372.

<sup>52</sup> The lowering of pipes into a trench by means of a pulley is not work in which "mechanical power is used." Bennett v. Aird (1899; C. C.) 107 L. T. Jo. (Eng.) 550, 1 W. C. C. 138.

<sup>53</sup> Ferguson v. Barclay (1902) 5 Sc. Sess. Cas. 5th series, 105, 40 Scot. L. R. 58, 10 Scot. L. T. 350.

<sup>54</sup> Johnson v. London General Omnibus Co. (1905; C. C.) 7 W. C. C. (Eng.) 83.

<sup>55</sup> Henderson v. Glasgow (1900) 2 Sc. Sess. Cas. 5th series, 127, 37 Scot. L. R. 857, 8 Scot. L. T. 118.



tripe manufactory where steam is used to force water into a boiler, and then to heat the water.<sup>56</sup>

The term "gain" means direct gain, so that a workman who was employed by a farmer on his farm to drive a movable steam engine, for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, and not for sale, is not employed on, in, or about a "factory."<sup>57</sup> It was also said in the same case that farming was not a trade.

A laundry which is part of the equipment of a hotel, in which is laundered the hotel linen, the clothing of the employees, as a part of their compensation, and also such clothing as the guests might desire, which was paid for by the guests, has been held not to be operated for "purposes of gain."<sup>58</sup>

A shed attached to hotel stables in which a chaff cutter was located for cutting feed for the owner's and travelers' horses is not a factory as the work was not carried on for direct gain.<sup>59</sup>

**5. Premises in which "manual labor is exercised in adapting an article for sale."**

These descriptive words were in one case held to be applicable to premises where beer was charged by mechanical power with gas, and then allowed to flow into bottles under the pressure of the gas through a tap, the nozzle of which

was pulled down into the necks of the bottles.<sup>60</sup>

**6. "Shipbuilding yards."**

The fact that repairs are being done in a ship in a dock does not make the dock for that reason a "shipbuilding yard;" therefore the dock was deemed not to be a factory for the purposes of the compensation.<sup>61</sup>

**7. "Bottle washing works,"**

These descriptive words do not apply where the bottle washing is merely ancillary to the main business that is carried on,<sup>61a</sup> nor where mechanical power of some kind is not used.<sup>62</sup>

**8. Electrical stations for lighting any "street, public place," etc.**

A workhouse which has an engine house and machinery used for the purpose of generating electricity for lighting purposes is a public place within schedule 6, part 1, clause 20, and is therefore a nontextile factory within the meaning of § 149, subsec. 1, of the factory and workshop act 1901.<sup>63</sup>

A stoker and assistant engineer in the electrical station of a training vessel moored in the river Thames, and used for training for sea service pauper boys under the charge of the metropolitan parishes and unions, is within the act, since the vessel is a "factory" and the employers were undertakers.<sup>64</sup>

<sup>56</sup> *Doswell v. Cowell* (1906) 95 L. T. N. S. (Eng.) 38, 22 Times L. R. 628, 8 W. C. C. 33.

<sup>57</sup> *Nash v. Hollinshead* [1901] 1 K. B. (Eng.) 700, 70 L. J. K. B. N. S. 571, 75 J. P. 357, 49 Week. Rep. 424, 84 L. T. N. S. 483, 17 Times L. R. 352.

<sup>58</sup> *Caledonian R. Co. v. Paterson* (1898) 1 Sc. Sess. Cas. 5th series, 26, 36 Scot. L. R. 60, 6 Scot. L. T. 194, 2 Adam, 620.

<sup>59</sup> *Bolt v. Heywood* (1909) 114 L. T. Jo. (Eng.) 294, 5 W. C. C. 151.

<sup>60</sup> *Hoare v. Truman* (1902) 71 L. J. K. B. N. S. (Eng.) 380, 86 L. T. N. S. 417, 50 Week. Rep. 396, 66 J. P. 342, 4 W. C. C. 58 (factory act 1878).

<sup>61</sup> *Spencer v. Livett* [1900] 1 Q. B. (Eng.) 498, 69 L. J. Q. B. N. S. 338, 64 J. P. 196, 48 Week. Rep. 323, 82 L. T. N. S. 75, 16 Times L. R. 179, 2 W. C. C. 112.

<sup>61a</sup> The wine cellars of a hotel, in which there are two small revolving brushes, worked, when desired, by water power from a tap, for washing the interior of the bottles, the cellars being primarily used for storage, and the processes of corking and bottle washing being merely ancillary to that object, are not a "bottle-washing work," and therefore not a factory. *Kavanagh v. Caledonian R. Co.* (1903) 5 L.R.A.1916A.

Sc. Sess. Cas. 5th series, 1128, 40 Scot. L. R. 812, 11 Scot. L. T. 281. The court said: "The legislature did not include every place in which bottles are washed, but only places where either the sole or principal business carried on is bottle washing."

<sup>62</sup> A claim for compensation under the workmen's compensation act 1897, by a spirit salesman against a spirit merchant, which set forth that the claimant received the injuries on account of which he claimed while engaged in the respondent's service, washing bottles in a store which "is used for the purpose of bottling beer and washing beer bottles, and is a factory within the meaning of the workmen's compensation act 1897," is irrelevant, in respect that it did not set forth that steam, water, or other mechanical power was used in the respondent's store. *Campbell v. McNeen* (1903) 5 Sc. Sess. Cas. 5th series, 1151, 11 Scot. L. T. 277, 40 Scot. L. R. 824.

<sup>63</sup> *Mile End Guardians v. Hoare* [1903] 2 K. B. (Eng.) 483, 72 L. J. K. B. N. S. 651, 67 J. P. 395, 89 L. T. N. S. 276, 19 Times L. R. 606, 20 Cox, C. C. 536, 5 W. C. C. 100.

<sup>64</sup> *Benson v. Metropolitan Asylums Board* (1908) 124 L. T. Jo. 403.

### 9. "Dock, wharf, quay."

The combined effect of the workmen's compensation act 1897 and the factory acts was that every dock, wharf, or quay was deemed to be a "factory," within the meaning of the former act, whether steam power was or was not being used in the work on which the servant claiming compensation was engaged.<sup>65</sup> So every dock or wharf is a factory, although none of the provisions of the factory act have in fact been applied to the dock or wharf.<sup>66</sup> While this construction of the act is not apparently questioned in any subsequent decision, it is to be noted that it does not imply that every workman injured on a dock, wharf, or quay is entitled to compensation.

A floating structure carrying cranes for loading and unloading ships, which is moored in a river 500 feet from the shore by chains fastened to piles driven

into the bed of the river, but is not connected with the shore except by boats, is a "wharf."<sup>67</sup>

Whether a space not immediately contiguous to the area appropriated to the ships themselves is embraced under one or other of the terms "dock, wharf, or quay" is determined as a question of fact, with reference to the elements of distance, the intervention of barriers, and the uses to which the space was put.<sup>68</sup>

In a number of decisions in the court of appeal and in the court of session, the view was at first taken that a ship, although in a dock, was not itself a "dock," and workmen at work therein were not in the protection of the statute.<sup>69</sup> But later, in a case in the House of Lords, it was held that compensation was recoverable where one of a gang of ship repairers fell from the gangway leading to the vessel, which was lying

<sup>65</sup> *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, 3 W. C. C. 135. In that case the respondents admitted that the construction of the act specified in the text was the correct one, and the admission was referred to by the lord chancellor as being "very frank and proper."

The doctrine of the House of Lords has been also applied in Scotland. *Strain v. Sloan* (1901) 38 Scot. L. R. 475, 3 Sc. Sess. Cas. 5th series, 663, 8 Scot. L. T. 498.

<sup>66</sup> *Barrett v. Kemp Bros.* [1904] 1 K. B. (Eng.) 517, 73 L. J. K. B. N. S. 138, 68 J. P. 196, 52 Week. Rep. 257, 90 L. T. N. S. 305, 20 Times L. R. 162, 7 W. C. C. 78 (applicant was in employ of firm of contractors, and was at work on a private road leading to the wharf), disapproving *Hall v. Snowden* [1899] 2 Q. B. (Eng.) 136, 1 W. C. C. 73, where a carter who was engaged in removing soil from a wharf was injured while he was leading his horse at a point in the street immediately adjoining the wharf, and it was held that the wharf was not a factory within the meaning of the statute, since no provisions of the factory acts were applicable to the wharf. *Collins, L. J.*, said: "We must, I think, place a limited construction on § 18 of the act of 1895; the provisions of that section can only apply to a wharf when an accident has occurred on the wharf, which may then become a factory for the purposes of that section; but that was not the case here, and that section is inapplicable."

<sup>67</sup> *Ellis v. Cory* [1902] 1 K. B. (Eng.) 38, 71 L. J. K. B. N. S. 72, 50 Week. Rep. 131, 85 L. T. N. S. 499, 18 Times L. R. 28, 66 J. P. 116, 6 W. C. C. 62. *Collins, M. R.*, said: "We now find this particular kind of construction being used for the purposes of a wharf, and it is adapted for being used at a greater distance from the shore L.R.A.1916A.

than an ordinary wharf, so as to save time and labor. It seems to me that it clearly was intended that structures of this kind should be included within the term 'wharf' as used in the factory acts. There is no real difference, except the distance from the shore, between this construction and that which has always been known as a wharf. I think, therefore, that this thing must be held to be a wharf within the meaning of § 7."

<sup>68</sup> Recovery was sustained in *Kenny v. Harrison* [1902] 2 K. B. (Eng.) 168, 71 L. J. K. B. N. S. 783, 87 L. T. N. S. 318, where a workman was injured while removing timber from a stack upon a piece of land within the ambit of a system of docks belonging to a railway company, which had been left by the company to timber merchants for the storage of timber. This land was about 40 yards from the water, and between it and the water ran the lines of a dock railway, not separated from the adjoining wharf by any fence or other physical barrier. Timber had sometimes been landed from the dock and brought to the land, but during the year of 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system more or less remote.

But recovery was denied in *Haddock v. Humphrey* [1900] 1 Q. B. (Eng.) 609, 82 L. T. N. S. 72, 69 L. J. Q. B. N. S. 327, 16 Times L. R. 143, 64 J. P. 86, 48 Week. Rep. 292, where a workman was killed while moving a log of timber in one of the yards near a wharf leased to a firm of timber merchants.

<sup>69</sup> In *Flowers v. Chambers* [1899] 2 Q. B. (Eng.) 142, 1 W. C. C. 51, where a laborer engaged in discharging refuse and manure from a vessel into barges was injured while engaged in moving a barge by falling from one deck of the vessel to another, compensation was denied. *A. L. Smith, L. J.*, said:



in the dock for repairs.<sup>70</sup> This decision was construed to mean that every dock and wharf was a "factory," and all work of whatsoever kind done on a ship in a dock was within the statute. The following cases take the view that *Raine v. Jobson*, (Eng.) supra, laid down the broad principle that any workman injured while at work in a vessel in a dock is entitled to compensation for his injuries, al-

though in some of these cases the facts are such that a recovery could be sustained on other grounds, and the decision itself turned upon other points.<sup>71</sup>

But in 1905 there was another House of Lords decision to the effect that the mere fact that a workman is injured while at work in a vessel which is floating in a dock does not entitle him to compensation, and that a seaman injured

"The question for our decision is not whether this dock was a factory within the meaning of the act, and I do not decide that point; the only question for us is whether a man employed on a ship lying in a dock is employed on, in, or about a dock within the meaning of this act. I think that he is not."

Following *Flowers v. Chambers* (Eng.) supra, it was held in *Durrie v. Warren* (1898) 15 Times L. R. (Eng.) 365, 1 W. C. C. 78, that a boy working on a staging outside a ship, being engaged in assisting to screw up the doors of the ship after the loading was completed, was not within the statute, since the ship was not a "dock," and the staging was not machinery or plant used in the process of loading and unloading.

Recovery was also denied in the following Scotch cases under the circumstances indicated:

*Jackson v. Rodger* (1900) 2 Sc. Sess. Cas. 5th series, 533, 37 Scot. L. R. 390, 7 Scot. L. T. 76 (where the court emphasized the fact that the fitting of the engines in a steamer, the work in which the servant was engaged, was being done without the aid of any steam power).

*Laing v. Young* (1900) 3 Sc. Sess. Cas. 5th series, 31, 38 Scot. L. R. 28, 8 Scot. L. T. 230 (act held not to be applicable to a lighter fitted with machinery, the property of and worked by stevedores, which was employed in raising goods from the hold to the deck of a vessel, moored between the lighter and the quay.)

*Healy v. Macgregor* (1900) 2 Sc. Sess. Cas. 5th series, 634, 37 Scot. L. R. 454, 7 Scot. L. T. 402 (act held not to be applicable where the work of loading or unloading a ship is done by servants on board her, and by means of her own machinery).

*Aberdeen Steam Traveling & Fishing Co. v. Peters* (1899) 1 Sc. Sess. Cas. 5th series, 786, 36 Scot. L. R. 573, 6 Scot. L. T. 373 (act held not to be applicable to the work of loading or unloading by means of machinery which forms part of the apparatus of a ship lying in a dock); *Aberdeen Steam Traveling Co. v. Kemp*, cited in *Ruegg, Employers' Liability*, 4th ed. p. 211, note (x).

<sup>70</sup> *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627. The Earl of Halsbury, L. C., said: "It would be, to my mind, a most unreasonable and extraordinary extension of that immunity given to persons interested in seafaring adventure, to suppose, because the L.R.A.1916A.

accident happened in or upon a ship, that therefore it is to be excluded from the operation of the act of Parliament generally." Lord Shand said: "The case is entirely different from that of a ship at sea, where the seaman who is injured is incurring only the ordinary maritime risks of men engaged in navigation. It is a case of ship-builders or repairers who were in the use and occupation of a dock or factory as defined in the statute, having servants working for them, one of whom sustained an accident with the fatal result described in the evidence. I cannot see any ground upon which it can be held that the employers and their workmen were not within the purview and terms of the statute."

The decision in *Merrill v. Wilson* [1901] 1 K. B. (Eng.) 35, 70 L. J. Q. B. N. S. 97, 65 J. P. 53, 49 Week. Rep. 161, 83 L. T. N. S. 490, 17 Times L. R. 49, 3 W. C. C. 155, in which it was not disputed that the quay upon which the applicant was working in unloading a vessel was capable of being a factory, was approved, and the inference was drawn by later cases that the House of Lords intended to overrule the earlier decisions, which it was apparently assumed were in conflict with the decision, in *Raine v. Jobson* (Eng.) but as a matter of fact the only mention of any of the earlier cases was a statement by one of the Lords that, as between *Merrill v. Wilson* and *Flowers v. Chambers* (Eng.) supra, he preferred the former case.

<sup>71</sup> A workman engaged in loading or unloading a vessel lying in a dock is within the act. *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. (Eng.) 204, 50 Week. Rep. 129, 85 L. T. N. S. 513, 18 Times L. R. 102, 71 L. J. K. B. N. S. 173, 66 J. P. 4, 4 W. C. C. 28.

And in *Griffin v. Houlder Line* [1904] 1 K. B. (Eng.) 510, 73 L. J. K. B. N. S. 202, 68 J. P. 213, 52 Week. Rep. 323, 90 L. T. N. S. 142, 20 Times L. R. 255, 6 W. C. C. 107, it was held that a seaman injured while clearing out the hold of a vessel moored to buoys preparatory to going to sea was within the statute. This case was, however, subsequently reversed by the House of Lords. See note 7, infra.

A ship which is being unloaded, while lying at quay, by means of a steam-winch derrick on board of it, is a factory. *Reid v. Anchor Line* (1903) 5 Sc. Sess. Cas. 5th series, 435, 40 Scot. L. R. 352, 10 Scot. L. T. 591.

A firm of employers engaged in painting and plumbing a ship lying in a dock, who

while discharging his ordinary duties in such ship is not within the act.<sup>72</sup> There is nothing apparently in the actual decision which conflicts with the earlier decision of the same court, but from the language used by the various judges it is exceedingly difficult to determine the precise ground of this decision. The following extract from the judgment of Romer, L. J., in the court of appeal,<sup>73</sup> seems to be a fair statement of the principles laid down in that decision: "Now it appears to me that the case is really governed by the principle of the decision in *Houlder Line v. Griffin* (Eng.) supra; for, doing the best I can (and I hope I have been successful) to extract from the judgments of the majority of the Lords who decided that case, the principles upon which they decided it, I think it appears that two principles were laid down: (1) That seamen employed in performing their ordinary duties as seamen afloat and on board the ship were

outside the general provisions of the workmen's compensation act 1897, unless, of course, there was anything special in their work to take them outside the ordinary position of seamen; and (2) that a ship afloat in a dock does not of necessity become part of the dock or premises within the dock, so that the owner of a ship which was afloat within a wet dock would not, merely because of that circumstance, become 'the person having the actual use or occupation of a dock or of any premises within the same or forming part thereof,' so as to be deemed to be the occupier of a factory. You must look, as I gather from that case, to the circumstance to see whether the owners have brought themselves or not, by something special that they are doing, within the operation of the act."

The lower courts, however, do not agree as to the precise basis of this decision. It admittedly prevents recovery in the case of an injury to a seaman

sent employees to do the work, are occupiers of the vessel, notwithstanding that some members of the crew were in charge of the ship for the owners. *Bartell v. Gray* [1902] 1 K. B. (Eng.) 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70, 4 W. C. C. 95. Stirling, L. J., said: It "has been said by the master of the rolls there are two questions in this case: First, whether the ship is to be regarded as a factory; secondly, whether the respondents are undertakers. Now, as to the first question, after the case of *Raine v. Jobson* (Eng.) supra, I do not feel any difficulty. A dock is a factory; a ship in a dock is in a factory; an accident on a ship in a dock is an accident in a factory."

A workman who had served as ship's carpenter on board a ship during one voyage, and was engaged for her next voyage, and in the interval between the voyages was employed by the shipowners in the work of repairing the ship, is, while engaged in unshackling the ship's cable, in order to turn it end for end, employed as a workman in the repair of a ship in or about a "factory," and the shipowners are liable to pay compensation, notwithstanding he was doing work that he might have been required to do at sea. *Cayzer v. Dickson* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 723. Lord McLaren said: "Comparing *Raine v. Jobson* (Eng.) with *Houlder Line v. Griffin* (Eng.) it is plain that the supreme court of appeal has kept clearly in view the distinction between the case where the dock is hired by the shipowner for the purposes of repairing a ship, and the case where a ship is being repaired while lying in the water space of the dock, and surrounded by the structure of a dock which is under the administration of a company or public body." L.R.A.1916A.

A laborer (not a seaman) employed to bring his employers' barges, which were kept in the employers' dock at night, from their places in the dock, when the dock gates were opened, alongside vessels in an adjoining river, for the purpose of taking cargo into the barges and bringing it back to the quay of the dock, to be there unloaded, is within the statute, since the dock is a "factory" and the employers are the "occupiers" of it. *Hanlon v. North City Mill. Co.* (1903) 2 I. R. (Ir.) 163.

<sup>72</sup> *Houlder Line v. Griffin* [1905] A. C. (Eng.) 220, 7 W. C. C. 87. The Earl of Halsbury, L. C., said: "It appears to me that the court was misled by the case of *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, but in that case the persons sought to be made responsible, and held to be responsible, were persons who had hired the dock for the purpose of repairing a vessel, and whether there was a vessel in it or not, they were liable if a workman met with an accident in that dock while engaged in working there. The court there proceeded upon the assumption that the then defendants were in the use and occupation of a dock which they had hired, and the fact that there was the wooden structure of a ship in it, being repaired, did not prevent the application of the section which rendered the occupiers of a dock the occupiers of a factory within the meaning of the act. If in that case the then defendants had the actual use and occupation of the dock, as they clearly had, it was impossible to deny that they were 'the undertakers.' This is a totally different case, and does not come within the meaning of that decision."

<sup>73</sup> *Smith v. Standard Steam Fishing Co.* [1906] 2 K. B. (Eng.) 275, 8 W. C. C. 76.



doing his customary duties on the ship although the ship may be in the dock.<sup>74</sup>

And see the cases defining the term "undertakers," post, 209.

#### 10. "Warehouse."

In some cases it was held that the leading idea of the section in which this expression is used was indicated by the preceding words "dock" wharf, or quay," and that the doctrine of ejusdem generis required that a warehouse, in order to be a factory within this section, should be near water.<sup>75</sup> But this opinion did not prevail in the English court of appeal.<sup>76</sup>

In one case the term "warehouse" was held to involve the idea of "a place normally of considerable size, mainly used for the storage of goods in bulk or in

large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise."<sup>77</sup> A place used in connection with a wholesale business for the purpose of storing goods is a warehouse;<sup>78</sup> a room or a cellar under a shop maintained by a builder and contractor, which is stored with building material, is a warehouse.<sup>79</sup> But if the storage of goods is merely ancillary to a retail business, the place where they are stored is held not to be a warehouse.<sup>80</sup> The court of appeal has held, however, that there is no absolute rule of law that a store attached to retail business cannot be a warehouse, and the case was sent back to the county court judge because he had so held.<sup>81</sup>

<sup>74</sup> A seaman employed on a steamer, who is injured while attending the boilers, is not entitled to compensation, although the vessel was, at the time, moored to a wharf, since the injury occurred while the applicant was attending to his usual duties as a seaman. *Owens v. Campbell* [1904] 2 K. B. (Eng.) 60, 73 L. J. K. B. N. S. 634, 68 J. P. 410, 52 Week. Rep. 481, 90 L. T. N. S. 811, 20 Times L. R. 459, 6 W. C. C. 54. This decision is squarely in line with the actual decision of the House of Lords in *Houlder Line v. Griffin* (Eng.).

And a "rigger" on a vessel in a dock is not at work on, in, or about a factory. *Thompson v. Sinclair* [1906] 2 K. B. (Eng.) 278, note. In this case, as reported in the note, the master of the rolls said that under *Houlder Line v. Griffin* (Eng.) a ship in a dock is not a factory.

Fireman engaged in such ordinary work as sponging the tubes of a steamship's boiler, while it is lying in a dock, cannot recover on the ground that the ship was at the time a "factory." *Coyne v. Glasgow S. Coasters Co.* (1906-1907) Sc. Sess. Cas. (Scot.) 112. Lord Kylliech said: "It is the dock which, under the act, is the factory. The ship comes in only when it becomes constructively part of the dock. Now the repairs here in question involved no use of the docks at all. They had no connection with the dock or the ship's presence in the dock." Lord Atwell said: "I think that it was incumbent upon the applicant to show that this dock was factory for one of two reasons: either that it was then being occupied for the purpose of loading or unloading, and that the accident occurred in the course of loading or unloading the particular ship; or otherwise, that it was being used for proper factory work, such as repairing the ship or the ship's machinery; and repairing in the proper sense of the term; viz., executing such repairs as are not merely incidental to every voyage on which the ship is engaged, but such as might be let out to a proper contractor or engineer to perform."

<sup>75</sup> In *McEwan v. Perth* (1905) 7 Sc. Sess. L.R.A.1916A.

Cas. 5th series (Scot.) 714, the term "warehouse" was construed as meaning only a warehouse connected with shipping work.

A warehouse to be within the act must be connected with docks and quays. *Smith v. Turner* (1901; C. C.) 3 W. C. C. (Eng.) 143.

<sup>76</sup> *Willmott v. Paton* [1902] 1 K. B. (Eng.) 237, 71 L. J. K. B. N. S. 1, 66 J. P. 197, 50 Week. Rep. 148, 85 L. T. N. S. 569, 18 Times L. R. 48, 4 W. C. C. 65 (holding that a yard or depot 5 acres in extent, and having sheds upon it, which was used for storing old iron, is a warehouse).

<sup>77</sup> *Colvine v. Anderson & Gibb* (1902) 5 Sc. Sess. Cas. 5th series, 255, 40 Scot. L. R. 231, 10 Scot. L. T. 482.

<sup>78</sup> *Green v. Britten* [1904] 1 K. B. (Eng.) 350, 73 L. J. K. B. N. S. 126, 68 J. P. 139, 52 Week. Rep. 198, 89 L. T. N. S. 713, 20 Times L. R. 116, 6 W. C. C. 82.

<sup>79</sup> *Evans v. Wilson* (1907; C. C.) 124 L. T. Jo. (Eng.) 201, 1 B. W. C. C. 148.

<sup>80</sup> A loft used for the storage of goods sold by a co-operative store in the ordinary course of business, storage being merely ancillary to the business carried on, is not a warehouse. *Hunt v. Grantham Co-op. Soc.* (1904; C. C.) 112 L. T. N. S. (Eng.) 364, 4 W. C. C. 67.

Where the storage of goods is merely ancillary to the general business of a retail store, it is not a warehouse merely because goods are stored on the premises. *Burr v. William Whiteley* (1902) 19 Times L. R. (Eng.) 117, 5 W. C. C. 102.

To the same effect was the decision in *Colvine v. Anderson & Gibb* (1902) 5 Sc. Sess. Cas. 5th series, 255, 40 Scot. L. R. 231, 10 Scot. L. T. 482, in which Lord Kinross said: "While it may be difficult to define 'warehouse,' I am of opinion that, as used in the act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of the goods in bulk or in larger quantities might naturally arise."

<sup>81</sup> *Moreton v. Reeve* [1907] 2 K. B. (Eng.)

An open space is not a warehouse simply because it is used for the storage of goods.<sup>82</sup> And an uncovered railroad goods yard is not a warehouse.<sup>83</sup>

A transit shed on a dock, taken by the postoffice for the storage of parcels during the Christmas season, is a factory, so that an employee of a firm of carriers employed by the postoffice, who is injured while at work therein, is within the act.<sup>83a</sup>

A large stabling and yard at which 600 or 700 horses were stabled, and 150 omnibuses were put up for the night, where 3 tons of fodder were usually kept, and where there was a farrier's forge and shop for shoeing the horses, in which was kept a considerable quantity of horseshoes to be used in shoeing the horses, is not a warehouse.<sup>84</sup>

**11. Machinery used in the process of loading or unloading a ship."**

—These words import either a landing of something from a ship, or a loading on the ship from the land.<sup>85</sup> They

are sufficiently comprehensive to cover the work of replacing the iron beams across a hatchway after the actual stowing of the goods has been completed.<sup>86</sup> But they are not applicable to a steam winch on a ship's deck, which is being used for the purpose of loading goods from a lighter;<sup>87</sup> nor to gangway doors through which cargo is taken into or discharged from a ship;<sup>88</sup> nor to a staging outside a ship, on which the servant was standing to screw up the iron doors of a ship after the loading was completed.<sup>89</sup>

Under the factory act of 1895, with reference to machinery for loading and unloading a vessel, there were no words to include a case where a vessel moored in a river was unloading her cargo into lighters. But the factory act of 1901 has been held to be broad enough to include such an operation.<sup>90</sup> Under this decision it would seem that any amendments to the factory act subsequent to 1906 were automatically made portions of the compensation act of that year.

401, 76 L. J. K. B. N. S. 850, 97 L. T. N. S. 63, 9 W. C. C. 72. In this case the respondent was a furniture dealer having two shops in different streets and also a building consisting of two stories, which he called a warehouse, in which he kept old furniture which he repaired, and also a quantity of new furniture; the respondent also kept materials for repairs in the building in large quantities. The court of appeal said that such a building might be found to be warehouse.

<sup>82</sup> An uncovered yard used to store material for the repair of roads and drains and for other works executed by the owners is not a warehouse in the ordinary sense of the word, and therefore not a factory within the meaning of the workmen's compensation act 1897. *M'Ewan v. Perth* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 714.

So, a dumping ground is not a warehouse or factory, even if some of the old material is sometimes sold. *Buckingham v. Fulham* (1905) 69 J. P. (Eng.) 297, 53 Week. Rep. 628, 21 Times L. R. 511, 3 L. G. R. 926, 7 W. C. C. 79.

<sup>83</sup> *Tench v. Fish* (1901; C. C.) 3 W. C. C. (Eng.) 140.

<sup>83a</sup> *Fogarty v. Wallis* [1903] 2 I. R. (Ir.) 522.

<sup>84</sup> *Johnson v. London General Omnibus Co.* (1905; C. C.) 7 W. C. C. (Eng.) 83.

<sup>85</sup> Where a ship was unloading in a dock by means of a crane on the quay hired by her owners, and a workman employed by them in unloading her was killed by the explosion of a case of percussion caps which he was placing in a basket attached to the chain of a crane for the purpose of its being hoisted out of the ship onto the quay, it was held that the accident arose out of, and in the course of, the workman's L.R.A.1916A.

employment on or about machinery used in the process of unloading to a quay within the meaning of the act of 1897. *Woodham v. Atlantic Transport Co.* [1899] 1 Q. B. (Eng.) 15, 68 L. J. Q. B. N. S. 17, 79 L. T. N. S. 395, 47 Week. Rep. 105, 15 Times L. R. 51, 1 W. C. C. 52.

This decision was followed in another, where a workman was killed while engaged in making up sets of bags to be hoisted from the hold of a ship by means of a crane operated by a man on the quay. *Lawson v. Atlantic Transport Co.* (1900) 82 L. T. N. S. (Eng.) 77, 16 Times L. R. 181, 2 W. C. C. 53.

<sup>86</sup> *Stuart v. Nixon* [1901] A. C. (Eng.) 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156, 3 W. C. C. 1.

<sup>87</sup> *Hennessey v. McCabe* [1900] 1 Q. B. (Eng.) 491, 2 W. C. C. 80. *Collins, J.*, said: "The statute is so drawn that it is difficult to discover what it really means, and it is indeed not easy to deal with it upon the broad ground of common sense."

<sup>88</sup> *Medd v. MacIver* (1899) 15 Times L. R. (Eng.) 364, 1 W. C. C. 76.

<sup>89</sup> *Durrie v. Warren* (1899) 15 Times L. R. (Eng.) 365, 1 W. C. C. 78.

<sup>90</sup> *Stevens v. General Steam Nav. Co.* [1903] 1 K. B. (Eng.) 890, 72 L. J. K. B. N. S. 417, 67 J. P. 415, 51 Week. Rep. 578, 88 L. T. N. S. 542, 19 Times L. R. 418, 5 W. C. C. 95. It was there held that the modification mentioned in the interpretation act 1889 includes additions; and that consequently, in the definition of a "factory" in the workmen's compensation act 1897, the reference to the factory and workshop act 1895 must be construed as if it were a reference to the provisions of § 104 of the factory and workshop act 1901, so as



**12. "Machinery temporarily used for the purpose of constructing a building."**

With reference to the clause of which these words form a portion, it was in one case held that an engine shed and room containing a steam engine connected with a mortar pan for mixing mortar for use on a building near at hand was a "factory" within the meaning of the workmen's compensation act.<sup>91</sup>

**g. — of "engineering work."**

These descriptive words have been held applicable to the employment of the driver of a water cart used to sprinkle a newly laid surface before it is rolled by a steam roller;<sup>92</sup> to the work of making and removing wooden moulds for cement where machinery driven by mechanical power was used in connection with the general work;<sup>93</sup> to the work of constructing streets in which use is made of the steam roller, although at the time of the injury the roller was not being used;<sup>94</sup> to work which includes the hoisting of iron girders by means of a steam winch to the top of a building to which a new

story is being added;<sup>95</sup> to the work of connecting a house drain to the main sewer;<sup>96</sup> to the work of laying pipe for water, gas, or any other purpose;<sup>97</sup> to the work of digging a tunnel under a railroad;<sup>98</sup> and to the work of laying pipes in a trench to be connected with a reservoir.<sup>99</sup> It may be that they also embrace work on a steam dredger.<sup>1</sup> But they do not cover pulleys worked by a winch;<sup>2</sup> nor the operation of lifting an air compressor by means of a hydraulic jack, for the purpose of taking it away on a truck after it had been purchased from the party who had used it in building a bridge;<sup>3</sup> nor the construction of a hydraulic crane without the use of any mechanical power;<sup>4</sup> nor the work of repairing a boiler by hand;<sup>5</sup> nor the work of clearing land from natural growth thereon.<sup>6</sup>

A lineman employed by a tramway company to repair its overhead wires is engaged in engineering work while going from one place where he had done some repairing to another place where there was repairing to be done.<sup>7</sup>

A workman engaged in repairing a

to include in the definition, among other things, machinery used in the process of unloading a ship in a navigable river.

<sup>91</sup> *McNicholas v. Dawson* [1899] 1 Q. B. (Eng.) 773, 68 L. J. Q. B. N. S. 470, 1 W. C. C. 80.

<sup>92</sup> *Middlemiss v. Berwickshire* (1900) 2 Sc. Sess. Cas. 5th series, 392, 37 Scot. L. R. 297, 7 Scot. L. T. 330.

<sup>93</sup> *McGregor v. Wright* (1901; C. C.) 3 W. C. C. (Eng.) 121.

<sup>94</sup> *Lord v. Turner* (1902; C. C.) 114 L. T. Jo. (Eng.) 133, 5 W. C. C. 87.

<sup>95</sup> *Cosgrove v. Partington* (1900) 17 Times L. R. (Eng.) 39, 64 J. P. 788.

<sup>96</sup> *Coles v. Anderson* (1905) 69 J. P. (Eng.) 201, 21 Times L. R. 204.

<sup>97</sup> *Bennett v. Aird* (1899; C. C.) 107 L. T. Jo. (Eng.) 550, 1 W. C. C. 138. It was said in this case that the laying of pipe for water, gas, or for any other purpose is ejusdem generis with the work of constructing, altering, or repairing sewers.

<sup>98</sup> *Adams v. Shaddock* [1905] 2 K. B. (Eng.) 859, 54 Week. Rep. 97, 22 Times L. R. 15, 75 L. J. K. B. N. S. 7, 93 L. T. N. S. 725. In this case, a workman engaged in digging a tunnel under a railroad for the purpose of laying telephone wires was held to be engaged in the alteration of a railroad and consequently was engaged in engineering work within the meaning of the act.

<sup>99</sup> *Atkinson v. Lumb* [1903] 1 K. B. (Eng.) 861, 72 L. J. K. B. N. S. 460, 67 J. P. 414, 51 Week. Rep. 516, 88 L. T. N. S. 789, 19 Times L. R. 412.

<sup>1</sup> In *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. (Eng.) 132, 80 L. L.R.A. 1916A.

T. N. S. 586, 47 Week. Rep. 533, 68 L. J. Q. B. N. S. 740, 15 Times L. R. 351, this point was referred to, but not explicitly decided, the action being held not maintainable for another reason.

<sup>2</sup> *Wrigley v. Bagley* [1901] 1 K. B. (Eng.) 780, 70 L. J. K. B. N. S. 538, 65 J. P. 372, 49 Week. Rep. 472, 84 L. T. N. S. 415.

<sup>3</sup> *Gibson v. Wilson* (1899) 1 Sc. Sess. Cas. 5th series, 1017, 36 Scot. L. R. 777, 7 Scot. L. T. 65.

<sup>4</sup> *Belsey v. Sadler* (1899; C. C.) 1 W. C. C. (Eng.) 141.

<sup>5</sup> A workman engaged in repairing a boiler, where the work was all done by hand and no mechanical power was being used, was not engaged in engineering work. *Cooper & Greig v. Adam* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 681, relying on *Wrigley v. Whittaker* [1902] A. C. (Eng.) 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

<sup>6</sup> The work of clearing land from the natural growth thereon is not a work of construction, alteration, or repair, which is intended by the act to be termed an engineering work. *Basanta v. Canadian P. R. Co.* (1911) 16 B. C. 304.

<sup>7</sup> *Rogers v. Cardiff* [1905] 2 K. B. (Eng.) 832, 54 Week. Rep. 35, 22 Times L. R. 9, 75 L. J. K. B. N. S. 22, 4 L. G. R. 1, 70 J. P. 9, 93 L. T. N. S. 683. The court took the view that the obligation of the corporation extended over the entire tramway, and it would not be proper to sever the two acts of repairing and try them as separate engineering works.

hydraulic lift, who was injured while availing himself of the hydraulic power of the lift, partly to put himself in a position to carry out the repairs, and partly for testing purposes, is engaged in engineering.<sup>8</sup>

A workman injured while engaged in the erection of a machine of which no mechanical power is needed is not within the protection of the statute, although mechanical power was necessary to carry the parts of the machine to the floor of the building upon which the machinery was erected.<sup>9</sup>

Employment on a chaff-cutting machine which was run by a steam engine and let out to farmers is not within the act, since such a machine is not a factory nor is the operation of it an engineering work.<sup>10</sup>

#### *h. — of "mine."*

The provision in the coal mines regulation act 1887, § 75, to the effect that "in this act, unless the context otherwise requires, 'mine' includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine," cannot be construed in such a sense as to enable an engine driver to recover for an injury received while he was operating his engine on his employers' private railway about  $\frac{3}{4}$  of a mile from the pit mouth. The words "adjacent to and belonging to the mine" mean "physically adjacent to and belonging to the mine itself," and not merely belonging to the owner.<sup>11</sup>

Road work done as a necessary preliminary to the operation of a mine has been held to be a "mine" within the act,

although no mine in actual operation may exist.<sup>12</sup>

#### *i. — of "undertakers."*

##### *1. In the case of a factory.*

Under § 7 of the act of 1897, the "undertaker" in the case of a factory is the "occupier" of a factory within the meaning of the factory acts of 1878 to 1895; as the two terms are synonymous so far as the construction of this act is concerned, the terms are used interchangeably, some cases making use of one term and some of the other.

An "undertaker" with relation to a factory is a person who occupies, and conducts his business upon, the premises where those processes are conducted which constitute the place of work or "factory" within the meaning of the act.<sup>13</sup> Accordingly a person who, for the time being, has the actual use of a "dock, wharf, or quay," as those terms are construed is liable as an "undertaker" for an injury received by one of his workmen, while engaged in any of the operations with a view to which the use of the premises has been obtained. Thus, shipowners, who, while acting as their own stevedores, have the temporary use of a part of a quay for the purpose of unloading a ship, are "occupiers" of a factory and consequently "undertakers" within the meaning of the act.<sup>14</sup> So, a person using machinery, the property of another, in the process of loading a ship from a quay, is an undertaker.<sup>15</sup>

As a ship in a dock may be a factory, the employer who is doing work on such a ship may also be an undertaker within the meaning of the act.<sup>16</sup> But a ship-

<sup>8</sup> *Tullock v. Waygood* [1906] 2 K. B. (Eng.) 261, 75 L. J. K. B. N. S. 557, 95 L. T. N. S. 223.

<sup>9</sup> *Murphy v. O'Donnell* (1906) 54 Week. Rep. (Eng.) 149, 8 W. C. C. 70.

<sup>10</sup> *Watkinson v. Crouch* (1899; C. C.) 107 L. T. Jo. (Eng.) 328, 1 W. C. C. 137.

<sup>11</sup> *Turnbull v. Lambton Collieries Co.* (1900) 82 L. T. N. S. (Eng.) 589.

<sup>12</sup> *Ellison v. Longden* (1901) 18 Times L. R. (Eng.) 48.

<sup>13</sup> See the judgment of Smith, L. J., in *Francis v. Turner Bros.* [1900] 1 Q. B. (Eng.) 480, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105.

<sup>14</sup> Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo onto the quay, and a workman employed by them was killed through an accident arising out of, and in the course L.R.A.1916A.

of, his employment on the quay, the ship owners are liable as "undertakers." *Merrill v. Wilson* [1901] 1 K. B. (Eng.) 35, 70 L. J. K. B. N. S. 97, 65 J. P. 53, 49 Week. Rep. 161, 83 L. T. N. S. 490, 17 Times L. R. 49.

In *Hainsborough v. Ralli Bros.* (1902) 18 Times L. R. (Eng.) 21, it was held that the consignees of a cargo of wheat, who were also the owners of the vessel in which the wheat was carried, are the occupiers of the quay alongside of which the vessel is lying while being unloaded.

<sup>15</sup> *Carrington v. Bannister* [1901] 1 K. B. (Eng.) 20, 70 L. J. K. B. N. S. 31, 83 L. T. N. S. 457, holding that, in § 23 of the factory act of 1895, the expression "such machinery," as last used in the latter part of the section, refers to the "machinery and plant" mentioned previously in clause (a), and not to the "machinery" mentioned in clause (b).

<sup>16</sup> Persons who are in the actual use or occupation of a dock (or, semble, of a



owner is not the occupier of a dock merely because his vessel is in the dock.<sup>17</sup>

The mere fact that repairing or other work is being done on a vessel in a dock

does not make the shipowner or employers making the repairs the occupier of the dock.<sup>18</sup> So, generally, persons engaged in repairing a factory or the ma-

berth in a dock), and employ workmen in cleaning or repairing a ship in the dock, are "undertakers" within the meaning of the act, and liable to pay compensation to a workman injured in the course of his employment. *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, and the men employed by the stevedores were "finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, and injured so that he died. Under these circumstances it was held by the House of Lords (Lord Lindley dissenting) that the stevedores were occupying a "factory," namely, the machinery, within the meaning of the act, and that the deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those acts. *Stuart v. Nixon* [1901] A. C. (Eng.) 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156.

A shipbuilding firm which has sent a newly-launched ship to a public dock to have the engines, for which it had contracted with another firm erected and fitted are "undertakers." *Jackson v. Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76, (1900) 37 Scot. L. R. 390, 2 Sc. Sess. Cas. 5th series, 533, 7 Scot. L. T. 363.

<sup>17</sup> *Houlder Line v. Griffin* [1905] A. C. (Eng.) 220, 7 W. C. C. 87, 74 L. J. K. B. N. S. 466, 92 L. T. N. S. 580, 21 Times L. R. 436, 53 Week. Rep. 609.

<sup>18</sup> In *Smith v. Standard Steam Fishing Co.* [1906] 2 K. B. (Eng.) 275, 75 L. J. K. B. N. S. 640, 54 Week. Rep. 582, 95 L. T. N. S. 42, 22 Times L. R. 578, 8 W. C. C. 76, following *Houlder Line v. Griffin* (Eng.) the actual decision was that a carpenter engaged in repairing a trawl board of a steam trawl moored to a jetty was not entitled to compensation for injuries received while engaged in that duty. It appears from the judgments given that one of the judges based the decision upon the ground that the carpenter was not injured while on the stone structure adjacent to the water, but in the ship, which was entirely water borne, while another judge apparently based his judgment upon the ground that since the trawl was floating in the water, the owners of it could not be said to be persons having the actual use or occupation of a dock.

Compensation was denied a workman injured while replacing a shaft in a ship, in L.R.A.1916A.

*Harrison v. Oceanic Steam Nav. Co.* [1907] 2 K. B. (Eng.) 420, note, 97 L. T. N. S. 466, note.

And in another case the same court held that millwrights who sent an employee on to a vessel in a dry dock to make some repairs in connection with the insulating of the refrigerators of the vessel are not the occupiers of a factory, and therefore not undertakers within the meaning of the act. *Burdon v. Gregson* [1906] 2 K. B. (Eng.) 283, 75 L. J. K. B. N. S. 644, 95 L. T. N. S. 45, 8 W. C. C. 76. *Romer, L. J.*, said that the employers were not using the dock in any true sense as a dock. *Houlder Line v. Griffin* (Eng.) was followed by all of the judges delivering judgment.

Ship repairers, while at work on a vessel in a wet dock, are not the "occupiers" of the dock. *Morgan v. Tydvil Engineering & Ship Repairing Co.* (1908) 98 L. T. N. S. (Eng.) 762, 24 Times L. R. 403, 1 B. W. C. C. 78.

In *Handford v. Clark* [1907] 2 K. B. (Eng.) 409, 76 L. J. K. B. N. S. 958, 97 L. T. N. S. 124, 9 W. C. C. 87, compensation was denied when an employee of engine makers was injured while doing some work on the engine. *Cozens-Hardy, M. R.*, said: "I also feel it impossible to say in any true and real sense of the word that there was any actual use or occupation of any portion of the quay by the employers in respect of the transactions which we have had before us." After referring to *Smith v. Standard Steam Fishing Co.* and *Harrison v. Oceanic Steam Nav. Co.* (Eng.) supra, the master of the rolls continued: "I do not think that it can fairly be asserted or assumed that those cases were decided simply on the ground that the ship itself did not occupy part of the factory. It was manifest to everybody—and the whole argument proceeded upon it—that the vessel in those cases was alongside the wharf or quay, or connected with the wharf or quay by a gangway or by ropes or something of that kind. And those decisions do, it seems to me, amount to this, that the mere fact that a vessel is berthed alongside a quay, and that in some sense, of course, the quay is being used for obtaining access to or from the land to the ship, is not enough to bring either the vessel itself or the portion of the quay which it so uses within the definition of 'factory' under the act."

In *Low v. Abernathy* (1900) 2 Sc. Sess. Cas. 5th series, 722, 37 Scot. L. R. 506, 7 Scot. L. T. 423, it was held that the mere fact that a steamship was lying in a dock while a workman employed by a firm of engineers was engaged in repairing the boilers did not make the firm "occupiers" of the dock.

A steamship company is not an "occupier" of a quay within the sense of § 7,

achinery in it are not "occupiers" of a factory so as to be undertakers within the meaning of the compensation act;<sup>19</sup> and it has been held that an employer is not liable, as an "undertaker," for injuries received by one of his servants in the factory of another person, while he was engaged in removing a portion of the plant which was to be transferred to the defendant's own factory.<sup>20</sup>

Persons under contract to furnish coal to vessels in a dock are not, merely because of that, occupiers of the dock.<sup>21</sup> And the agents of a ship owned by a foreign country doing business abroad are not undertakers.<sup>22</sup>

To render the employer an "undertaker" it is not necessary that his possession of the premises should be exclusive. All that is requisite is that he

should be in possession so far as may be necessary for the purpose of doing the work in hand. A firm of employers engaged in painting and plumbing a ship lying in a dock, who sent employees to do the work, are occupiers of the vessel, notwithstanding some members of the crew are in charge of the ship for the owners.<sup>23</sup> And persons who have entered into a contract to make pigeonholes in what is admittedly a warehouse within the act, and who have such use or occupation of the premises as is necessary for the performance of the work, which is essential to the use of the warehouse for the purposes for which it is required by the government, are the occupiers of the warehouse within the meaning of the act.<sup>24</sup> And the occupants of a small hut on a dock, engaged in supplying horses

subsec. 2, of the act, so as to be liable for compensation to the servant of a contractor engaged in trimming coal on the wharf, preparatory to putting it on board one of the company's vessels, which had not yet arrived, although a particular berth in the harbor was allowed the company for loading and unloading its vessels, and it had an office and a staff of servants constantly employed in the receipt and discharge of cargo, where the same berth was also used by another steamship company, which also had an office there, and when the berth was not required by either of these companies the harbor master allowed other vessels to load or discharge at the berth. *Stewart v. Dublin & G. Steam Packet Co.* (1902) 5 Sc. Sess. Cas. 5th series, 57, 40 Scot. L. R. 41, 10 Scot. L. T. 343.

So, in *Bruce v. Henry* (1900) 2 Sc. Sess. Cas. 5th series, 717, 37 Scot. L. R. 511, 7 Scot. L. T. 421, it was held that shipping agents who had contracted with the owners of a vessel lying at a dock to load her were not the "occupiers" of the dock.

<sup>19</sup> A firm of engineers making a preliminary run for the purpose of testing machinery in a building belonging to a cold storcompany were denied to be "occupiers in." *Purves v. Sterne* (1900) 2 Sc. Sess. Cas. 5th series, 887, 37 Scot. L. R. 696.

In *Malcom v. McMillan* (1900) 2 Sc. Sess. Cas. 5th series, 525, 37 Scot. L. R. 383, 7 Scot. L. T. 364, it was held that an iron founder was not liable to the widow of a workman who was killed by falling from a scaffold while he was doing some work in a soap factory to which he had been sent for that purpose.

A firm of boiler makers are not "undertakers" within the meaning of the act, so as to be responsible for injuries to a workman in their employ who was injured while repairing a boiler in a spinning mill belonging to another person. *Cooper & Greig v. Adam* (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 681, relying on *Wrigley v. Whitaker* [1902] A. C. (Eng.) 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. L.R.A.1916A.

656, 86 L. T. N. S. 775, 18 Times L. R. 559.

<sup>20</sup> In *Francis v. Turner Bros.* [1900] 1 Q. B. (Eng.) 478, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105, 2 W. C. C. 61, it was held that employers who send a workman on their business to the factory of a third party are not, while the workman is engaged therein, the occupiers of said factory.

<sup>21</sup> In *Stewart v. Darngavil Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 425, 39 Scot. L. R. 302, 9 Scot. L. T. 378, it was held that a coal dealer who was under contract to deliver coal to the steamers of a packet company at a particular berth, who sends the coal from his own premises to the dock when required, is not the occupier of the dock.

<sup>22</sup> *Shea v. Drolenvaux* (1903) 6 W. C. C. (Eng.) 93.

<sup>23</sup> *Bartell v. Gray* [1902] 1 K. B. (Eng.) 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70.

A similar doctrine was laid down in *Jackson v. Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76.

The decision in *Bartell v. Gray* (Eng.) was based upon *Raine v. Jobson* [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, 3 W. C. C. 135, the effect of which was greatly modified by later decisions. The ultimate decision in the *Bartell* Case is apparently in conflict with other decisions cited *supra*.

<sup>24</sup> *Weavings v. Kirk* [1904] 1 K. B. (Eng.) 216, 73 L. J. K. B. N. S. 77, 68 J. P. 91, 52 Week. Rep. 209, 89 L. T. N. S. 577, 20 Times L. R. 152, 6 W. C. C. 95. Collins, M. R., said: "It appears to me that this question is really decided by the case of *Bartell v. Gray* [1902] 1 K. B. (Eng.) 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70. The respondents in this



and men for hauling wagons loaded with coal, are "occupiers" of the dock.<sup>25</sup> But a person who has a mere casual interest in a warehouse by being the owner or purchaser of a parcel of goods stored therein is not an "occupier" thereof.<sup>26</sup>

## 2. In the case of engineering work.

A person may be an undertaker although he supplies labor only.<sup>27</sup> So, where it is the usual practice of a firm of builders to enter into contracts for pulling down and rebuilding, but they invariably sublet the work of pulling down, they are "undertakers" as regards the servants of the subcontractors.<sup>28</sup> And a building contractor who is erecting a tenement for himself is deemed to be within that description in such a sense as to be liable to a servant of one of the trading firms with whom he had contracted for particular parts of the work which are not being executed by his own workmen.<sup>29</sup> But the owner of a building who contracts with someone to execute repairs on the building, and does not engage in the work himself, has been held not an "undertaker."<sup>30</sup>

The word "undertaker" is not restricted to persons who contract for the con-

struction of a building as a whole. Hence, where a building over 30 feet high is being constructed by means of a scaffolding, and the work of construction is carried on by several persons, not acting jointly, but each of them contracting with the building owner for the construction of a separate substantial part of the building, each of them is an "undertaker," and is liable to compensate the workmen employed by him for personal injury sustained by them in the course of their employment. Every workman employed by the undertaker upon the building is within the act, whatever may be the nature of his own particular work.<sup>31</sup> But where the work of decorating a church is distinct from that of restoring it, the undertaker for repairs is not liable to pay compensation for injury to the workman engaged in the decoration, although the scaffolding used is put up by the undertaker.<sup>32</sup>

It was at first held that a subcontractor for engineering work is not an "undertaker" within the meaning of the compensation act.<sup>33</sup> But this view has now been pronounced erroneous by the House of Lords.<sup>34</sup>

An employee who, under a contract

case had all such occupation of a considerable space in a warehouse as was necessary to enable them to carry out the work which they had contracted to do. It was argued that they did not occupy any part of the warehouse qua warehouse. I do not know that it is necessary that they should so occupy for the purposes of the act, or that we ought to go beyond the words of the section itself in this respect; but, assuming that it is necessary, it is essential to the existence of a warehouse, and its use as such for the purposes for which it is required, that works or repairs of the kind which the respondents had contracted to do should be performed within it."

<sup>25</sup> *Pacific Steam Nav. Co. v. Pugh* (1907) 23 Times L. R. (Eng.) 622, 9 W. C. C. 39.

<sup>26</sup> *Ramsay v. Mackie* (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 106.

<sup>27</sup> *Wagstaff v. Perks* (1902) 87 L. T. N. S. (Eng.) 558, 51 Week. Rep. 210, 5 W. C. C. 110, 19 Times L. R. 112.

<sup>28</sup> *Knight v. Cubitt* [1902] 1 K. B. (Eng.) 31, 71 L. J. K. B. N. S. 65, 66 J. P. 52, 85 L. T. N. S. 526, 50 Week. Rep. 113, 18 Times L. R. 26.

<sup>29</sup> *Stalker v. Wallace* (1900) 2 Sc. Sess. Cas. 5th series, 1162, 37 Scot. L. R. 898, 8 Scot. L. T. 134.

<sup>30</sup> *McGregor v. Dansken* (1899) 1 Sc. Sess. Cas. 5th series, 536, 36 Scot. L. R. 393 (Lord Young dissenting).

<sup>31</sup> *Mason v. Dean* [1900] 1 Q. B. (Eng.) 770, 69 L. J. Q. B. N. S. 358, 64 J. P. 244, 48 Week. Rep. 353, 82 L. T. N. S. 139, 16 Times L. R. 212.  
L.R.A.1916A

And see *Weavings v. Kirk* [1904] 1 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 77, 68 J. P. 91, 52 Week. Rep. 209, 89 L. T. N. S. 577, 20 Times L. R. 152 (employer who contracted to cut pigeonholes in building others were constructing, held to be "undertaker.")

<sup>32</sup> *Hardy v. Moss* (1904; C. C.) 116 L. T. Jo. (Eng.) 201, 6 W. C. C. 68.

<sup>33</sup> *Cass v. Butler* [1900] 1 Q. B. (Eng.) 777, 69 L. J. Q. B. N. S. 362, 64 J. P. 261, 48 Week. Rep. 309, 82 L. T. N. S. 182, 16 Times L. R. 227; *Cooper v. Davenport* (1900) 16 Times L. R. (Eng.) 266.

<sup>34</sup> *Cooper v. Wright* [1902] A. C. (Eng.) 302, 71 L. J. K. B. N. S. 642, 51 Week. Rep. 12, 86 L. T. N. S. 776, 18 Times L. R. 622, holding that a person contracting to erect a building is entitled to be indemnified by a subcontractor for the amount for which he is liable to a workman employed by the latter. See § 1, subsec. 4 of the act.

*Cooper v. Wright* (Eng.) was followed by *Topping v. Rhind* (1904) 6 Sc. Sess. Cas. 5th series, 666, 41 Scot. L. R. 573, 12 Scot. L. T. 88, holding that a subcontractor for ornamental carving work which was part of the design of a building was an "undertaker," and was consequently liable to indemnify the principal contractor for compensation paid by him to an injured workman. To the same effect, *Evans v. Cook, L. & Y. Ins. Co.* [1905] 1 K. B. (Eng.) 53, 74 L. J. K. B. N. S. 95, 53 Week. Rep. 81, 92 L. T. N. S. 43, 21 Times L. R. 42; *McCabe v. Jopling* [1904] 1 K. B. (Eng.) 222, 73 L. J. K. B. N. S. 129, 68 J. P. 121, 52 Week. Rep. 358, 89 L. T. N. S. 624, 20 Times L. T. 119;

with a firm engaged in building operations on their own premises, supplies the labor for the brick work,—the workmen so supplied, although paid by him, being under the control, while at work, of the foreman of the building owners,—is not an “undertaker.”<sup>35</sup>

A firm of engineers who have sold a hay-cutting machine are “undertakers” as regards one of their workmen, who is injured while its operation is being tested.<sup>36</sup> A railroad company is liable as undertaker for injuries to a workman employed in “tipping” coal into vessels, where it owns the machinery by which the tipping is done, although the work has been contracted out to a third person who employs the applicant.<sup>37</sup>

*3. When workmen employed in ship-building yard are not excluded from provisions of the act.*

The question whether a dock 2 miles from a shipbuilding yard was “near” it was held to be a question of fact, not of law.<sup>38</sup> In the case cited the court agreed with the finding of the arbitrator in favor of the servant, as having been injured “near” the yard. A ship in the harbor not more than  $1\frac{1}{2}$  miles from a shipbuilding yard is not “near” the yard.<sup>39</sup> A vessel being completed 100 yards away from the quay is not “about” a quay.<sup>40</sup>

*Part C. American decisions.*

*XXIV. Introduction to American decisions.*

Although the American compensation statutes are patterned more or less close-

Wagstaff v. Perks (1902) 51 Week. Rep. (Eng.) 210, 87 L. T. N. S. 558, 19 Times L. R. 112.

A person making a subcontract to do the painting in a church that is being restored is an undertaker. Hardy v. Moss (1904; C. C.) 116 L. T. Jo. (Eng.) 201, 6 W. C. C. 68.

<sup>35</sup> Percival v. Garner [1900] 2 Q. B. (Eng.) 406, 69 L. J. Q. B. N. S. 824, 64 J. P. 500, 16 Times L. R. 396, holding that the persons from whom recovery should have been sought were the firm of contractors.

<sup>36</sup> Reid v. Fleming (1901) 3 Sc. Sess. Cas. 5th series, 1000, 38 Scot. L. R. 720, 9 Scot. L. T. 113.

<sup>37</sup> Hanson v. Great Central R. Co. (1901; C. C.) 3 W. C. C. (Eng.) 152.

<sup>38</sup> McMillan v. Barclay (1899) 2 Sc. Sess. Cas. 5th series, 91, 37 Scot. L. R. 61, 7 Scot. L. T. 214.

<sup>39</sup> Streeter v. Courtney (1902; C. C.) 114 L. T. Jo. (Eng.) 217, 5 W. C. C. 123.

<sup>40</sup> Owen v. Clark (1901; C. C.) 3 W. C. C. (Eng.) 170.  
L.R.A.1916A.

ly after the English act, none of them are couched in the precise terms of that act, and consequently the conclusions of the courts as to the proper construction to be given to the various provisions of the different statutes do not necessarily follow the decisions of the English courts. Nevertheless, the American courts, although not considering the latter decisions as binding, do attach great weight to them and frequently cite them as precedents. It has therefore been deemed wise to group and arrange the American decisions so far as the character of the statutes permit, in the same general manner as the English decisions were arranged in the earlier part of this note, where, it is to be observed, the classification follows the order of the clauses in the English act. By means of frequent cross references a comparison of the decisions can be easily and quickly made.

Inasmuch as practically every one of the statutes differs in some respects from all the others, and many of the decisions are cases of first impression, and as yet stand alone, anything like a logical or scientific arrangement or classification is impossible, and this annotation must in places, at least, appear fragmentary and disconnected. Effort has been made, however, to bring together the decisions upon the corresponding statutory provisions, pointing out, so far as justified by the language of the court, the similarities or differences in the statute in order to show, if possible, to what extent the decisions of one jurisdiction support or are in conflict with those in other jurisdictions.

While it is not proposed to analyze the American statutes at any length, a few of the marked characteristics and differences should be noted in order to understand more clearly the decisions. These observations will be general in character, and will not touch upon the individual peculiarities of the particular statute.

In regard to the application of the statutes generally, they may be divided into two groups,—elective and compulsory. The elective statutes give the option to the employer and employee (the employees only have the option under the Arizona law) to come under the statute or to retain the rights and obligations under the common law or existing statutes. The compulsory statutes, such as those of Washington, New York, California, and Ohio,<sup>41</sup> do not afford any

<sup>41</sup> The most striking difference between the California act of 1911 and the later act



such option, but take the place of the existing laws as to all employers and employees coming within the terms of the act. It should be noted that some of the compulsory statutes, such as those of New York and Washington, apply only to certain designated occupations considered extrahazardous in character. Certain occupations, such as farm labor and domestic service, in which the danger of serious personal injury is very small, are specially excepted from the operation of many of the elective statutes.

Again, in respect to the provisions relative to payment of compensation, the statutes may be divided into two classes,—direct payment and insurance statutes. The direct payment statutes, following the English act, provide for the payment of the compensation by the employer directly to the employee;<sup>42</sup> while insurance statutes require the employer to take out insurance either with an insurance bureau operated by the state, or with a private company, and if an employee is injured, the compensation is paid by the insurer. Under some insurance statutes, the premium to be paid by the employer is based solely upon the character of his business and the size of his pay roll. In one respect, at least, these latter statutes tend to accomplish one of the great purposes of all of the acts, namely, the removal of friction between the employer and the employee. Theoretically, at least, it is immaterial to the employer from a financial standpoint, whether an injured employee receives compensation or not. His financial obligations are terminated on the payment of his premium, and he has no reason to object to the payment of compensation which is presumed to aid his employee and make him a more useful servant.

Compensation acts differ from other acts, such as the employers' liability acts, fellow servant statutes, etc., in that the recovery of compensation is not predicated upon the fault of the master, actual or imputed, but solely upon loss of wage-earning ability. An employee who suffers a loss of such wage-earning ability by accident or personal injury arising out of his employment is entitled to compensation although the master has not been negligent; and even if the workman has himself been negligent, if such negligence on his part does not amount to wilful or intentional misconduct. Almost all of the statutes, particularly the optional acts, contain provisions both as to the employer's liability for damages and as to the awarding of compensation to the injured workman. The distinction between compensation statutes and the employers' liability acts has not always been preserved in the official titles to the acts, and some of them have properly the joint title of "employers' liability and workmen's compensation" act, since they contain features of both kinds. The confusion thus arising has been noted by some courts.<sup>43</sup> In this note the term "compensation" will in all cases be used to designate the statute if the case arises under the compensation features of the act, although other portions of the act may deal with employer's liability properly so-called.

As has been stated earlier in the note, it is not the purpose of annotation of this character to enter into a discussion of the sociological and ethical grounds advanced in support of these acts. A few judicial statements of the purposes of the acts, however, may be of interest and will be found in the note below.<sup>44</sup>

of 1913 is that the compensation provisions of the latter statute are compulsory on all employees and employers coming within its terms. *Western Indemnity Co. v. Pillsbury* (1915) — Cal. —, 151 Pac. 398.

<sup>42</sup> The Connecticut act is a direct settlement act as distinguished from an insurance act. *Kenneron v. Thames Towboat Co.* (1915) 89 Conn. 367, post, 436, 94 Atl. 372.

<sup>43</sup> The act of April 4th, 1911 (P. L. p. 134), should be designated and referred to as the "workmen's compensation act;" and the act of April 13th, 1909 (P. L. p. 114), as the "employees' liability act." *Gregutis v. Wacark Wire Works* (1914) 86 N. J. L. 610, 92 Atl. 354, affirming — N. J. L. —, 91 Atl. 98.

<sup>44</sup> In *Young v. Duncan* (1914) 218 Mass. 346, 106 N. E. 1, in speaking of the purpose of the statute, the court said: "It was a humanitarian measure, enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common

law and under the employers' liability act have failed to accomplish that measure of protection against injuries, and of relief in case of accident, which it was believed should be afforded to the workman."

In *McRoberts v. National Zinc Co.* (1914) 93 Kan. 364, 144 Pac. 247, the court, in speaking of the purpose of the act, said: "In the enactment of the compensation law the legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made under a system which was intended largely to eliminate controversies and litigation, and place the burden of accidental injuries incident to such employments upon the industries themselves; or rather, upon the consumers of the products of such industries."

**XXV. Constitutionality of American statutes.**

The constitutionality of the American statutes is treated in annotation on page 409, post.

**XXVI. Conflict of laws.**

As to the conflict of laws with reference to compensation statutes, see annotation, page 443, post.

**XXVII. Extraterritorial effect of American statutes.**

As to the extraterritorial effect of the compensation acts, see annotation, page 443, post.

By the logic of the workmen's compensation act, personal injuries to employees are a natural element in the cost of production, and are necessarily paid by the consumers of the things produced. Marshall, J., in *Milwaukee v. Miller* (1913) 154 Wis. 652, ante, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

One main purpose of the act is to establish between the employee and the employer, in place of the common-law or statutory method of redress for personal injury based upon tort, a system whereby compensation for all personal injuries or death of the employee received in the course of and arising out of his employment, whether through unavoidable accident, negligence, or otherwise (except through his serious and wilful misconduct), shall be determined forthwith by a public board and paid by the insurer. *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.

Proper administration of the workmen's compensation act requires appreciation of the manifest legislative purposes to abolish the common-law system regarding injuries to employees as unsuited to modern conditions and conceptions of moral obligations, and erect in place thereof one based on the highest present conception of man's humanity to man, and obligations to members of the employee class,—one recognizing every personal loss to an employee, not self-inflicted, as necessarily entering into the cost of production, and required to be liquidated in the step ending with consumption. Marshall, J., in *Milwaukee v. Miller* (Wis.) supra.

Elective workmen's compensation acts, such as the Connecticut act, are founded upon the theory of a contract existing between the workman and the employer, an implied consideration of which is provision for compensation for injury to the workman, arising in the course of his employment, not through his intentional or wilful misconduct. *Hotel Bond Co.'s Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

In speaking of the nature of the payment to be made by the employer to an injured employee, Haight, District Judge, L.R.A.1916A.

**XXVIII. Limitation of application of statutes by Federal laws.**

As to the limitation of the application of the compensation statutes by reason of Federal laws, see annotation, page 461, post.

**XXIX. Construction, effect, and application of statutes generally.****a. Strict or liberal construction.**

Notwithstanding the compensation acts are in derogation of the common law, the courts have generally held that, being highly remedial, they should be broadly and liberally construed.<sup>45</sup> A contrary view has apparently been taken by the

in *Wood v. Camden Iron Works* (1915) 221 Fed. 1010, said: "I think that the logical result of such construction is that the contract of employment provided for in the statute is to pay in consideration of work to be done, so much during the time the employee is working, and if he shall be injured, his wages shall be considered to have been increased in the proportions allowed by the statute for the time therein provided, the excess to be payable at certain designated periods in the future."

<sup>45</sup> *Hotel Bond Co.'s Appeal* (1915) 89 Conn. 143, 93 Atl. 245; *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, post, 436, 94 Atl. 372; *Coakley's Case*, 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508; *Sullivan's Case* (1914) 218 Mass. 141, post, 378, 105 N. E. 463, 5 N. C. C. A. 735; *Young v. Duncan* (1914) 218 Mass. 346, 106 N. E. 1; *Meley's Case*, 219 Mass. 136, 106 N. E. 559; *State ex rel. Virginia & R. L. Co. v. District Ct.* (1914) 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; *Re Petrie* (1915) 215 N. Y. 335, 109 N. E. 549; *Winfield v. New York C. & H. R. Co.* (1915) 168 App. Div. 351, 153 N. Y. Supp. 499; *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. Supp. 554; *Sadowski v. Thomas Furnace Co.* (1914) 157 Wis. 443, 146 N. W. 770.

The provisions of the Minnesota act should be given a very liberal construction. *State ex rel. Splady v. District Ct.* (1915) 128 Minn. 338, 151 N. W. 123; *State ex rel. Northfield v. District Ct.* (1915) — Minn. —, 155 N. W. 103.

The Wisconsin act should be liberally construed in favor of life, health, and limb. *Tallman v. Chippewa Sugar Co.* (1913) 155 Wis. 36, 143 N. W. 1054.

The Washington act, although in derogation of the common law, should be liberally construed, having regard to the former law and the defects or evils sought to be cured and the remedy provided. *Peet v. Mills*, 76 Wash. 437, post, 358, 136 Pac. 685, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786.

The Washington act, because of its humaneness and declaration of a new public policy, should be interpreted liberally and broadly in harmony with its purpose



Michigan court.<sup>46</sup> And probably none of the courts would give the act such a broad construction as to include employees or accidents not within its provisions either by express language of the act, or by a necessary implication therefrom,<sup>47</sup> although the Washington court has said that the act should be construed to include those within the reason, although outside the letter, of the statute.<sup>48</sup>

#### *b. Retroactive effect of statutes.*

Several of the statutes have been held not to apply to injuries occurring before their passage. Thus, the Arizona statute (Special Laws [Ariz.] 1912, p. 23, Special Session) has no application to injury occurring before its passage.<sup>49</sup> And the provision in the New Jersey act of 1913 that claims for personal injury shall be

to protect injured workmen and their dependents, independent of question of fault. *Wendt v. Industrial Ins. Commission* (1914) 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

In construing a statute which is referable to the police power, and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system, the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be embodied in the enactment, and the effect and consequences as regards responding to the prevailing conception of the necessities of public welfare, should be considered, and the enactment given such broad and liberal meaning as can be fairly read therefrom, so far as required to effectively eradicate the mischief it was intended to obviate. *Marshall, J., in Milwaukee v. Miller* (1913) 154 Wis. 652, ante, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

<sup>46</sup> The statute, being in derogation of the common law, should be strictly construed although it is remedial, and provides a remedy against a person who otherwise would not be liable. *Andrejwski v. Wolverine Coal Co.* (1914) 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807.

<sup>47</sup> The Washington act, being in derogation of the common law, cannot be construed so as to include those who do not, by words or necessary implication, come within its terms. *Hillestad v. Industrial Ins. Commission* (1914) 80 Wash. 426, 141 Pac. 913, 6 N. C. C. A. 763.

The statute is highly remedial in character, and the court ought, therefore, to guard against a narrow construction, and should not exclude a servant from the benefits thereof unless constrained by unambiguous language, or the clear intent as gathered from the entire act. *State ex rel. Duluth Brewing & Malting Co. v. District Ct.* (1915) 129 Minn. 176, 151 N. W. 912.

<sup>48</sup> While the statute is of a remedial character, L.R.A.1916A.

barred unless agreed upon or sought to be adjudged within one year is not retroactive so as to apply to the case of an accident which occurred before the act of 1913, containing the limitation, was passed.<sup>50</sup>

The claim to compensation by a dependent of a deceased workman is governed by the act which was in effect at the time of his death, and not by the law in effect at the time of his injury.<sup>51</sup>

#### *c. Occupations to which acts are applicable.*

Not all of the American statutes are applicable to all classes of employers, nor to all classes of employment. Some of them do not apply unless the employer employs a certain number or more of employees; while other statutes apply only to certain specifically designated employ-

acter, and is to have a liberal construction, no doubt, for the purposes for which it is designed, it is not to be extended by implication to accidents not clearly within the language of the act." *De Voe v. New York State R. Co.* (1915) 169 App. Div. 472, 155 N. Y. Supp. 12.

<sup>49</sup> "The act should be liberally interpreted to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy to be promoted, even to the inclusion of cases within the reason, although outside the letter, of the statute; and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees, regardless of the cause of the injury." *Zappala v. Industrial Ins. Commission* (1914) 82 Wash. 314, post, 295, 144 Pac. 54.

<sup>50</sup> *Arizona & N. M. R. Co. v. Clark* (1913) 125 C. C. A. 305, 207 Fed. 817 (affirmed on appeal from decision on other points in 235 U. S. 669, 59 L. ed. 415, L.R.A.1915C, 834, 35 Sup. Ct. Rep. 210).

<sup>51</sup> *Birmingham v. Lehigh & W. Coal Co.* (1915) — N. J. L. —, 95 Atl. 242.

The provisions of the act of 1913, requiring all claims of compensation to be filed within one year after the accident, does not apply to a claim for compensation arising under the act of 1911. *Baur v. Court of Common Pleas* (1915) — N. J. L. —, 95 Atl. 627.

<sup>52</sup> In *State ex rel. Carlson v. District Ct.* (1915) — Minn. —, 154 N. W. 661, the employee was injured on June 30th, and died from the effects of the injury at about 1:30 A. M. on the morning of July 1st. The court, in holding that the compensation recoverable was governed by the law which went into effect July 1st, said: "The claim of the plaintiff for compensation does not arise from the injury to her husband, but is a new and distinct right of action created by his death."

ments which are of an extrahazardous nature.

Part B of the Connecticut act applies to all employers, whether employing five or more or less than five employees, and is not limited by the provisions in part A, dealing with employers' liability, which does not abolish the common-law defense in case of injury by employees of any employer having regularly less than five employees.<sup>52</sup>

The New Hampshire statute is elective and applies to five different occupations considered apparently by the legislature as extrahazardous. These occupations are, first, the operation of steam or electric railroads; second, work in any shop, mill, or factory in which there is machinery propelled or operated by steam, or other mechanical power, in which five or more persons are engaged; third, the construction, operation, alteration, or repairs of wires, cables, etc., charged with electric current; fourth, work necessitating dangerous proximity to explosives or to any steam boilers; fifth, in or about any quarry, mine, or foundry. The word "mill," as used in § 1 of the New Hampshire act, includes not only the building in which the defendants' business is carried on, but their dam, flume, and the ways they provide for the use of their employees.<sup>53</sup> Where it clearly appears from the evidence that there were more than fifty employees in the mill, and at least twenty-five employees in the room in which the claimant was at work, it is not error for the court to instruct the jury that the case was within the compensation act.<sup>54</sup>

The maintenance of water mains in connection with a waterworks plant is the "maintaining of a structure" within the meaning of the Illinois act.<sup>54a</sup>

The New York and Washington statutes are both compulsory in character, and apply only to the so-called extrahazardous employments which are expressly designated in the statutes.

It has been held that the express mention of the occupations embraced in the several groups of hazardous employments within the New York act necessarily excludes employment not there mentioned; consequently, as the work of harvesting ice is not mentioned in any group, an employee engaged in that work is not within the provisions of the act.<sup>55</sup> Applying the same principle, it has been held that if the schedules do not cover the injury suffered by an employee, such as disfigurement only, he does not fall within the purview of the act, and is entitled to maintain an action under the laws in force at the time the compensation act was passed.<sup>56</sup> The express provisions for injuries received in long-shore work in one section of the New York act exclude such injuries from the provisions of another section, dealing with injuries received in the operation of vessels other than those of other states or countries, used in interstate or foreign commerce.<sup>57</sup>

So far as railroad employees are concerned, the New York statute applies only while the employee is engaged in "the operation, including construction and repair," of the railroad; consequently a motorman who had closed his day's work, and had signed his name to the register denoting that fact, and while going to have his watch tested, had reached a point in the public highway where he was run down by an automobile over which the employer had no control, is not within the protection of the act.<sup>58</sup>

An employee of a wholesale grocery which maintains a storage warehouse for

<sup>52</sup> Bayon v. Beckley (1915) 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588.

<sup>53</sup> Liability under the New Hampshire act, which provides for injury received in work in any shop, mill, factory, or other place in connection with or in proximity to, and machinery propelled or operated by steam or other mechanical power, is not limited to injuries received in proximity to the machinery, but will include injuries by falling from the milldam, where the provision in respect to explosives limits the liability to injuries caused by explosion. Boody v. K. & C. Mfg. Co. (1914) 77 N. H. 208, ante, 10, 90 Atl. 860, Ann. Cas. 1914D. 1280.

<sup>54</sup> Wheeler v. Contoocook Mills Corp. (1915) 77 N. H. 551, 94 Atl. 265.

<sup>54a</sup> Brown v. Decatur (1914) 188 Ill. App. 147.

<sup>55</sup> Aylesworth v. Phoenix Cheese Co. (1915) — App. Div. —, 155 N. Y. Supp. 916.

<sup>56</sup> The New York statute does not cover L.R.A.1916A.

injuries resulting in the amputation of a portion of the workman's ear. Shinnick v. Clover Farms Co. (1915) 169 App. Div. 236, 154 N. Y. Supp. 423.

<sup>57</sup> Jensen v. Southern P. Co. (1915) 215 N. Y. 514, post, 34, 109 N. E. 600.

<sup>58</sup> De Voe v. New York State R. Co. (1915) 169 App. Div. 472, 155 N. Y. Supp. 12. The court said: "It is the fact of being engaged in the hazardous employment which gives the right to compensation, and not the fact that the employer is 'carrying on or conducting the same,' and that the employee is injured while performing some incidental duty in connection with such employment." Kellogg, J., concurring in the result, said that if the prevailing opinion meant that there could be no liability unless the deceased met his death while actually operating his car as a motorman, he could not agree with it; that he thought that while the employee was performing any service for the master connected with and growing



its goods cannot recover compensation for injuries received therein, since warehousing, within the meaning of the statute, is the carrying on the business of warehousing for pecuniary gain.<sup>59</sup> Grinding meat in an electric chopper in a meat market is a hazardous employment within § 2, group 30, which relates to "manufacture or preparation of meat for meat products;"<sup>60</sup> but a butcher or assistant to the chef at a hotel, whose duty it was to distribute meat to the cooks as ordered, is not embraced within groups 30 and 33 of the New York act, which relate to "manufacture or preparation of meat or meat products" and "canning or preparation of fruit, vegetables, meat, or foodstuffs."<sup>61</sup> The operation of a truck which is made a hazardous employment by section 2, group 41 of the New York act is not restricted to the actual process of driving the truck.<sup>62</sup> Cutting up and beveling glass or making looking glasses of it may be considered a manufacture of glass products within the meaning of § 2, of group 20 of the New York act.<sup>63</sup> A motor and shipping clerk employed by a glass-selling agency, who was required from time to time to operate the elevator, there being no regular elevator man, is engaged in a hazardous occupation within the meaning of the New York act.<sup>64</sup> A wholesale druggist may be as-

sumed to compound and make different substances together into medicine and thus be engaged in the "manufacture of drugs and chemicals" within the meaning of the New York act.<sup>64a</sup> No compensation is recoverable under the New York act for injury to a janitor who casually and incidentally did plumbing, repair, and heating work and who was injured while ascending a ladder to the roof merely for the purpose of hanging up a flag.<sup>64b</sup> A macaroni manufacturer who engages a carpenter by the hour to do some work upon his premises in the way of improvements is not engaged in the hazardous employment of structural carpentry or repair of buildings as contemplated by group 42 of the New York act.<sup>64c</sup>

Under the Washington statute, an employer's liability is not to be determined by an answer to the question whether he is principally engaged in an extrahazardous business or in conducting extrahazardous work, but if he conducts any department of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of the act, his workmen would come within the class designated by the act.<sup>65</sup> And a workman is within the compensation act, if, at the time he was injured, he was properly engaged in an extrahazard-

load and unload the truck and properly to guard and look after the load while it was being driven through the streets. *Hendricks v. Seeman* (1915) — App. Div. —, 155 N. Y. Supp. 638.

<sup>59</sup> *Mihm v. Hussey* (1915) — App. Div. —, 155 N. Y. Supp. 860.

<sup>60</sup> *Kohler v. Frohmann* (1915) 167 App. Div. 533, 153 N. Y. Supp. 559.

<sup>61</sup> *De la Gardelle v. Hampton Co.* (1915) 167 App. Div. 617, 153 N. Y. Supp. 162. The court said: "Groups 30 and 33 of § 2 of the statute under consideration, which enumerates and defines hazardous employments, cannot, in my judgment, be regarded as covering any employment consisting of the preparation of meat or foodstuffs for cooking purposes in the ordinary course of household duties, domestic service, or the conduct of hotels or restaurants in which meats or foods are prepared and cooked for eating on the premises."

<sup>62</sup> A teamster who had operated a truck during the day and was putting his horse in the stall at night when it jumped and squeezed him against the side of the stall causing his death, is injured while "operating a truck" within the meaning of the act. *Smith v. Price* (1915) 168 App. Div. 421, 153 N. Y. Supp. 221.

A helper to the driver of a truck is within the protection of the statute where the employers, a wholesale grocery company, found it necessary to employ two men to

<sup>63</sup> *McQueeney v. Sutphen* (1915) 167 App. Div. 528, 153 N. Y. Supp. 554.

<sup>64</sup> *Wilson v. Dorfinger* (1915) — App. Div. —, 155 N. Y. Supp. 857; followed by *Chappelle v. 412 Broadway Co.* (1915) — App. Div. —, 155 N. Y. Supp. 858; *Cremin v. Mordecai* (1915) — App. Div. —, 155 N. Y. Supp. 859; *McIntyre v. Hilliard Hotel Co.* (1915) — App. Div. —, 155 N. Y. Supp. 859; *Sheridan v. P. J. Grol Constr. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 859.

<sup>64a</sup> A general utility man engaged in an establishment where drugs and chemicals are manufactured must be presumed to participate more or less in the work of the establishment. *Larsen v. Paine Drug Co.* (1915) — App. Div. —, 155 N. Y. Supp. 759 (workman was engaged at the time of the accident in building a shelf but in order to do so had to handle drugs and chemicals in the building).

<sup>64b</sup> *Gleissner v. Gross* (1915) — App. Div. —, 155 N. Y. Supp. 946.

<sup>64c</sup> *Bargey v. Massaro Macaroni Co.* (1915) — App. Div. —, 155 N. Y. Supp. 1076.

<sup>65</sup> A company engaged in the managing and superintendence of business properties for the owners, a department of whose business is the repairing of buildings, in which department it employs carpenters, painters,

ous employment, although he was not regularly employed in such employment.<sup>66</sup>

A workman for a city contractor, engaged in constructing a manhole from the surface of the street to the water pipes of the city water system, is not engaged in an extrahazardous employment within the Washington statute, so as to prevent his bringing an action for damages against a third person through whose negligence he was injured.<sup>67</sup> An employee engaged in operating an elevator or lift in a mercantile establishment is not engaged in extrahazardous employment within the meaning of the Washington statute.<sup>68</sup>

### XXX. Election to come in under optional act.

As to alternative remedies furnished workman or dependent under the English act, see ante, 72.

and men in electrical work, is within the statute and is liable to the state for premiums due to the Industrial Insurance Commission. *State v. Business Property Security Co.* (1915) — Wash. —, 152 Pac. 334.

A carpenter employed by a department store, who was killed by an electric shock while engaged in a repair shop maintained by the company, which shop was operated primarily for the repair of its delivery wagons and automobiles, and contained a carpenter's bench and a power lathe, and other machinery operated by electric current, was engaged in an extrahazardous employment within the meaning of the Washington act. *Wendt v. Industrial Ins. Commission* (1914) 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

<sup>66</sup> An employee, although not regularly employed in hazardous employment under the Washington statute is within the statute and cannot recover in an action for damages against the employer not in default in his payments to the accident fund, where, at the time of the injury, the employee was properly and lawfully engaged in extrahazardous employment in obedience to commands and orders issued to him by one who was in lawful authority over him, whose orders it was his duty to obey. *Replogle v. Seattle School Dist.* (1915) 84 Wash. 581, 147 Pac. 196 (truck driver temporarily engaged in installing motors).

<sup>67</sup> *Puget Sound Traction, Light & P. Co. v. Schleif* (1915) 135 C. C. A. 616, 220 Fed. 48.

<sup>68</sup> *Guerrieri v. Industrial Ins. Commission* (1915) 84 Wash. 266, 146 Pac. 608, 8 N. C. C. A. 440.

<sup>69</sup> There is no provision in the Illinois workman's compensation act of 1911 which confers upon the employee the right to elect to be governed by the act in his relation to an employer who has rejected the act. *Dietz v. Big Muddy Coal & I. Co.* (1914) 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419; *Price v. Clover Leaf Coal Min. Co.* (1914) 188 Ill. App. 27. L.R.A.1916A.

As to recovery of compensation under the English act where action for damages has failed, see ante, 81.

In order to stand the test of constitutionality, most of the statutes make it optional with both the employer and employee to accept or reject the compensation features of the act. If either party rejects them, they are not applicable.<sup>69</sup> But provisions amounting almost to coercion are made in order to induce the parties to subscribe to the act. The ordinary form is to take away the defenses of assumption of risk, contributory negligence, and fellow service from the employer who fails to subscribe to the statute, but to preserve them to the employer who subscribes as against the employee who does not.<sup>70</sup>

Under the Michigan act, where the defendant does not elect to pay compensation in the manner and to the extent

The compensation features of the Wisconsin act are not applicable where the workman has not complied with the terms of the statute. *Salus v. Great Northern R. Co.* (1914) 157 Wis. 546, 147 N. W. 1070.

<sup>70</sup> *Crooks v. Tazewell Coal Co.* (1914) 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304, 5 N. C. C. A. 410; *Dooley v. Sullivan* (1914) 218 Mass. 597, 106 N. E. 604; *Pope v. Heywood Bros. & W. Co.* (1915) 221 Mass. 143, 108 N. E. 1059; *Crucible Steel Forge Co. v. Moir* (1915) 135 C. C. A. 49, 219 Fed. 151, 8 N. C. C. A. 1006; *Karny v. Northwestern Malleable Iron Co.* (1915) 160 Wis. 316, 151 N. W. 786; *Cavanaugh v. Morton Salt Co.* (1913) 152 Wis. 375, 140 N. W. 53.

In *Puza v. C. Hennecke Co.* (1914) 158 Wis. 482, 149 N. W. 223, the court said that the statute abrogating the rule of assumption of risk and the fellow servant rule was intended to make it uncomfortable for employers who fail to come in under the compensation act.

In *Karny v. Northwestern Malleable Iron Co.* (1915) 160 Wis. 316, 151 N. W. 786, the court said that the policy of the law is to preserve the defenses of assumption of risk, negligence of a fellow servant, and contributory negligence, to an employer who shall elect to come under the act, respecting an employee who does not, as a constitutional method of coercing both parties to accept the benefits and burdens of the new system in place of those of the old.

In *Boody v. K. & C. Mfg. Co.* (1914) 77 N. H. 208, 90 Atl. 859, Ann. Cas. 1914D, 1280, 5 N. C. C. A. 840, Young, J., said: "By the enactment of chapter 163, Laws of 1911, the legislature intended to change the common law so that one who is injured by accident while engaged in work in which the risks are great and difficult to avoid may be compensated, in part, at least, for the loss thereby sustained, if the accident is one arising out of and in the course of the employment, regardless of the cause of his injury (§ 2). It seems to have been understood, however, that this change could not



provided by the act, the defenses of co-service and assumption of risk are not available, nor is the defense of contributory negligence, unless such negligence on the part of the servants should appear to be wilful.<sup>71</sup> Under some acts the defense of contributory negligence is not entirely abrogated, but the doctrine of comparative negligence is established.<sup>72</sup>

Under the Illinois act it has been held that the defenses of assumption of risk, contributory negligence, and fellow service are cut off from an employer who refuses to come in under the act, regardless of the status of the employee.<sup>73</sup>

The Massachusetts court has held that it is "voluntary" assumption of risk, and not "contractual" assumption of risk, which the statute abrogates in the case of an employer who is not a subscriber under the act. This decision means nothing more, however, than that an employee, in order to recover from an employer who had not subscribed to the act, must show that such employer was negligent and that such negligence caused the injury; since, under the rule

of the Massachusetts court, "contractual assumption of risk" includes only such risks as are necessarily incident to the employment, and does not include those risks which are created by the negligence of the master.<sup>74</sup> To the same effect is the decision of the Iowa court which holds that the statute of that state does not, by taking away the affirmative defense of assumption of risk render an employer who elects not to come in under the act liable in damages if he is wholly free from negligence.<sup>74a</sup>

An employer who has elected to come under the act does not, by objecting to an employee not so electing, having the benefit of the act, waive the statutory preservation of the common-law defenses.<sup>75</sup> An employee cannot, under the Connecticut act, be deprived of the benefits of the compensation features of the act which both parties have accepted, by reason of the failure of employer to fulfil the requirements of the statute.<sup>76</sup>

The Illinois compensation act of 1911 is not an exercise of the police power because it deprives an employer, under the

be made without the assent of all those affected by it. It was necessary, therefore, from that view point, to secure the assent of those affected by the act as well as to provide for compensation to the injured. It is the office of § 1 to define those who come within the operation of the act, and of §§ 2, 3, and 4 to induce them to accept its provisions. The means devised to induce such acceptance by employers were: (1) To provide that if an employee is injured by accident arising out of and in the course of the employment, caused in whole or in part by the negligence of his employers or of their servants or agents, the employers shall be liable to the employee for all the loss he sustains, and he 'shall not be held to have assumed the risk' of his injury, but there shall 'be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed' (§ 2); and then (2) to relieve employers who accept the act in accordance with the provisions of § 3 from the burdens imposed on them in § 2. In other words, the means the legislature devised to induce employers to accept the provisions of the act was to take from those who do not accept it about the only real defense to an action by a servant which is open to his employer at common law."

<sup>71</sup> *Lydman v. De Haas* (1915) — Mich. —, 151 N. W. 718, 8 N. C. C. A. 649.

<sup>72</sup> *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

An election by an employer not to pay compensation under the act relegates the workman to a suit at law for his damages, measured by the law as it existed prior to L.R.A.1916A.

the act, except that contributory negligence, if any, of the workman, shall be considered in reduction of his damages. *French v. Cloverleaf Coal Min. Co.* (1914) 190 Ill. App. 400.

Under the Kansas act of 1911, an employer who had not elected to come in under the act could not avail himself of the defenses of assumption of risk and contributory negligence, save in mitigation of damages. *Spottsville v. Western States Portland Cement Co.* (1915) 94 Kan. 258, 146 Pac. 356.

<sup>73</sup> *Dietz v. Big Muddy Coal & I. Co.* (1914) 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419.

An employer who has elected to reject the provisions of the Illinois act is deprived of his common-law defenses, although the employee has not elected to come under the act. *Synkus v. Big Muddy Coal & I. Co.* (1914) 190 Ill. App. 602; *Favro v. Superior Coal Co.* (1914) 188 Ill. App. 203.

<sup>74</sup> *Ashton v. Boston & M. R. Co.* (1915) — Mass. —, 109 N. E. 820.

<sup>74a</sup> *Hunter v. Colfax Consol. Coal Co.* (1915) — Iowa, —, 154 N. W. 1037.

<sup>75</sup> *Karny v. Northwestern Malleable Iron Co.* (1915) 160 Wis. 316, 151 N. W. 786.

<sup>76</sup> An employee who has accepted part B of the Connecticut act cannot be deprived of the benefits thereof by reason of the fact that his employer, who has also accepted part B, has failed to furnish satisfactory proof of his solvency and ability to pay directly to the workman or beneficiaries the compensation provided by the act, or to insure his full liability under part B, as required by § 30 of part B, although, under § 42 of part B, such employer is himself deprived of such benefit. *Bayon v. Beckley* (1915) 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588.

conditions specified in § 1, of the common-law defenses of assumed risk, contributory negligence, and fellow service; it is merely a declaration by the legislature of the public policy of the state in that regard.<sup>77</sup> But the Wisconsin act, similar in terms to the Illinois act, has been said to be "referable to the police power."<sup>78</sup>

Under some of the acts the employer and employee are subject to the terms of the act unless they take affirmative action to show their intention not to be bound thereby.<sup>79</sup> In the absence of any evidence to the contrary it will be presumed that the parties have accepted the terms of the act.<sup>80</sup> In order to sustain a judgment for the plaintiff in a common-law action where it appears that compensation act was in force, it must be pleaded and proved that the parties were not under the provisions of the act.<sup>81</sup>

<sup>77</sup> *Deibeikis v. Link-belt Co.* (1913) 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.

<sup>78</sup> *Milwaukee v. Miller* (1913) 154 Wis. 652, ante, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

<sup>79</sup> If an employee desires to avoid the act and preserve his common-law right, he must give the notice required by part 1, § 5 of the act, when he enters the employment, rather than when he is notified of the insurance by the employer, in accordance with part 4, § 21, or he will be held to have availed himself of the act. *Young v. Duncan* (1914) 218 Mass. 346, 106 N. E. 1.

Both the employer and the employee in the specified employment become subject to the Illinois workmen's compensation act of 1911 without any affirmative action upon their part, and the elective feature of the act is to be exercised in order to avoid being governed thereby, and not to cause the act to be applied in any given case. *Dietz v. Big Muddy Coal & I. Co.* (1914) 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419.

Where a railroad company had elected to come in under the provisions of the Wisconsin compensation act, an employee of the company who failed to give written notice to the contrary is also within the act although he was employed first in Minnesota, and went into Wisconsin to work upon the request of the employer, and was injured four days thereafter. *Johnson v. Nelson* (1914) 128 Minn. 158, 150 N. W. 620.

Every employer and employee coming within the terms of the act is bound by it unless he makes an election not to accept it. *Harris v. Hobart Iron Co.* (1914) 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44.

<sup>80</sup> There is a presumption of law that both the employer and employee are covered by the provisions of the act unless it appears that one or both of them has filed an L.R.A.1916A.

But under the original Kansas act, where there was such evidence that the employer had not elected to come within the provision, and there was neither allegation nor proof that he had done so, the court properly assumed and instructed the jury that such an election had not been made.<sup>82</sup> So, under the earlier Kansas act it was held by the Missouri court that the statement required by § 44 of the act to be filed with the secretary of the state, to the effect that the employer elects to come under the provision of the act, is not required to be in any precise or technical form, and does not need to be evidenced with the same formality as a deed or other instrument which transfers property.<sup>83</sup> And under the Michigan and Washington statutes, the employer must take affirmative steps to accept the act before he can rely upon it or be subjected to its provisions. Thus, if an employer desires to rely upon the

election to the contrary, as provided by law. *Krisman v. Johnston City & B. M. Coal & Min. Co.* (1914) 190 Ill. App. 612.

Where a complaint sets up a contract of hiring between the employer and employee, made subsequent to the taking effect of the workmen's compensation act of 1911, and does not aver that the contract contained any express statements in writing that § 2 of the act was not intended to apply, nor that any written notice to that effect was given, it will be presumed that the parties accepted and were bound by the provisions of that section. *Gregutis v. Waclark Wire Works* (1914) 86 N. J. L. 610, 92 Atl. 354, affirming — *N. J. L.* —, 91 Atl. 98.

A complaint under the employers' liability act of New Jersey, for injuries received in that state after the compensation act took effect, will be dismissed where there is nothing to show that either party has taken steps to put himself outside of the scope of that act. *Wasilewski v. Warner Sugar Ref. Co.* (1914) 87 Misc. 156, 149 N. Y. Supp. 1035.

The statutory presumption that all employers affected by the workmen's compensation act of 1911, as amended by the act of 1913, are within its provision, obtains until the contrary appears, and nonliability to an action for compensation because of an election to stand outside the provisions of the act is an affirmative defense. *Gorrell v. Battelle* (1914) 93 Kan. 370, 144 Pac. 244; *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 92 Kan. 146, 139 Pac. 1193, 5 N. C. C. A. 763.

<sup>81</sup> *Krisman v. Johnston City & B. M. Coal & Min. Co.* (1914) 190 Ill. App. 612.

<sup>82</sup> *Spottsville v. Western States Portland Cement Co.* (1915) 94 Kan. 258, 146 Pac. 359.

<sup>83</sup> *Platt v. Swift & Co.* (1915) 188 Mo. App. 584, 176 S. W. 434.



industrial insurance act, which withdraws from the court jurisdiction over injuries to employees, he must plead and prove a compliance upon his part with the provisions of the act.<sup>84</sup> So, in order to subject the employer to the provisions of the Michigan act, he must file his acceptance with the Industrial Accident Board, and that Board must approve of it.<sup>85</sup>

Under the Rhode Island act, an employer may file his acceptance of the act at a date prior to that upon which the act took effect.<sup>86</sup> An employee injured before he gives notice that he elects not to be bound by the Minnesota act is under its provisions, although he gave such notice within the first thirty days immediately succeeding the taking effect of the act, and such notice took effect immediately.<sup>87</sup> Under the Washington act, providing that upon the employer being in default in his payment into the insurance fund, and his failure to make good the deficit upon demand, an injured workman shall have a right and the employer cannot rely upon the act, an injured workman has no cause of action where the Commission notified the employer to make up a deficit within thirty days, and the latter did so, but not before the employee was injured.<sup>88</sup>

Under the Illinois act, an election by the employer to reject the act stands until it has been withdrawn.<sup>89</sup> In an action

for personal injury arising after the passage of the act of 1911, evidence is admissible to show that the employer had rejected the provisions of the act.<sup>90</sup> By the express provision of the New Jersey act, it will apply to minors unless notice to the contrary be given by or to the parents or guardians of the minor; and a notice that the employer elects not to come under the provisions of the act is not sufficient where it is posted in the works or given to the minor workman in his pay envelop.<sup>91</sup> The legislature may remove the disability of infancy so as to permit an infant old enough to go to work under the labor statute to make an election as to whether he will work under the compensation act or the common law.<sup>92</sup>

An election by a workman to come in under the act will, in case of his death, bind his personal representatives and his dependents.<sup>93</sup>

An employer who takes part in proceedings for compensation without claiming exemption from the operation of the act cannot be heard upon appeal to say that he had not accepted the provisions of the act.<sup>94</sup> A judgment for damages after a trial conducted on the theory that the proceeding was an action for damages cannot be treated as an award for compensation, although both parties have subscribed to the act; but the judgment must be reversed.<sup>95</sup>

In the same case it was held that the authority of the officer of a corporation who signed a statement to the effect that the corporation had come within the provisions of the Kansas compensation act, to make and file a statement, need not be affirmatively shown where it is proved and clearly shown that notices to that effect were posted in all parts of the plant long prior to the injury in question, particularly where the question whether the employer elected to come under the provisions of the act is not raised by the injured employee.

<sup>84</sup> *Acres v. Frederick & Nelson* (1914) 79 Wash. 402, 140 Pac. 370, 5 N. C. C. A. 557.

<sup>85</sup> In order to be within the terms of the workmen's compensation act, the provisions of the act must be followed, and any statement by the plaintiff subsequent to the accident, or acceptance of compensation by him, will not make the act applicable if the employer has failed to file his acceptance with the Accident Board, and if that Board has failed to approve of it. *Bernard v. Michigan United Traction Co.* (1915) — Mich. —, 154 N. W. 565.

<sup>86</sup> *Coakley v. Mason Mfg. Co.* (1914) — R. I. —, 90 Atl. 1073.

<sup>87</sup> *Harris v. Hobart Iron Co.* (1914) 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44.

<sup>88</sup> *Barrett v. Grays Harbor Commercial Co.* (1913) 209 Fed. 95, 4 N. C. C. A. 756.

<sup>89</sup> *Snykus v. Big Muddy Coal & I. Co.* L.R.A.1916A.

(1914) 190 Ill. App. 602; *Bateman v. Carterville & B. M. Coal Co.* (1914) 188 Ill. App. 357.

<sup>90</sup> *Crooks v. Tazewell Coal Co.* (1914) 262 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304, 5 N. C. C. A. 410.

<sup>91</sup> *Troth v. Millville Bottle Works* (1914) 86 N. J. L. 558, 91 Atl. 1031.

<sup>92</sup> *Herkey v. Agar Mfg. Co.* (1915) 90 Misc. 457, 153 N. Y. Supp. 369.

<sup>93</sup> Where a deceased employee by his agreement, either express or implied, had accepted and become bound by the provisions of § 2 of the compensation act, his personal representative cannot maintain an action under the death act for damages for his death, even though the only dependents decedent left surviving him were alien non-residents of the United States, and consequently not entitled to compensation under the act of 1911. *Gregutis v. Waclark Wire Works* (1914) 86 N. J. L. 610, 92 Atl. 354, affirming — N. J. L. —, 91 Atl. 98.

<sup>94</sup> *Milwaukee Western Fuel Co. v. Industrial Commission* (1915) 159 Wis. 635, 150 N. W. 998.

<sup>95</sup> Where it appears that the parties had elected to be bound by the provisions of the Kansas act, but the trial was conducted on the theory that it was an action for damages, the jury were instructed to consider the case as one based upon common-

### XXXI. *Exclusiveness of remedy furnished by statute.*

As to alternative remedies furnished workman or dependents under the English act, see ante, 72.

As to recovery of compensation under the English act where action for damages has failed, see ante, 81.

#### *a. In general.*

It has been stated that the compensation acts are exclusive in all cases in which they are applicable,<sup>96</sup> and all other remedies are taken away.<sup>97</sup> But if the statutes do not apply, then the employee must resort to the existing common-law or statutory remedy. This is true in case the parties have not come in under the optional act,<sup>98</sup> and also where the employee for some reason is not embraced within the terms of the statute.<sup>99</sup>

The Arizona act passed in accordance with the mandate of § 8, article 18, of the Constitution, differs from all other acts in that it is compulsory as to the employer, and optional as to the employee, and the latter's option may be exercised after the injury has been inflicted.<sup>1</sup> But the option whereby the employee may settle for compensation or

may retain the right to sue the employer, as otherwise provided for by the Constitution, is personal to the workman, and no such election is afforded to his personal representative.<sup>2</sup> And in case of injuries resulting in the death of the workman, if, as a matter of fact, the deceased after the injury, and before his death, elected to accept compensation under the act, it is a matter of defense to be raised by plea or answer.<sup>3</sup>

Where a petition states the cause of action under the factory act, and charges negligence, but discloses a situation in which a recovery can be had only under the workmen's compensation act of 1911, as amended by the act of 1913, the district court, having the jurisdiction of the parties and subject-matter, should not dismiss the action, but should retain it for the remedy to which the plaintiff may prove his right.<sup>4</sup> The Illinois compensation act is not the kind of a statute contemplated by the provision of the mining act that if the compensation act shall be enforced in the state, providing for compensation to workmen for all injuries received in the course of their employment, the provisions of such compensation act should apply instead of the pro-

law liability for negligent injury, and the verdict was rendered awarding damages for pain, suffering, and disfigurement, the verdict cannot be treated as an award of compensation, nor can a judgment be entered by a supreme court for any sum as compensation, although there was some evidence tending to show partial disability, and some testimony as to the recent earnings of the plaintiff. *McRoberts v. National Zinc Co.* (1914) 93 Kan. 364, 144 Pac. 247.

<sup>96</sup> Where the employer and employee have elected to come within the provisions of the compensation law, that law is exclusive. *McRoberts v. National Zinc Co.* (1914) 93 Kan. 364, 144 Pac. 247.

<sup>97</sup> The legislature, by the compensation act, intended to take away from employees who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, and to substitute for such remedies the wider right of compensation given by the act. *King v. Viscoloid Co.* (1914) 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254.

<sup>98</sup> The factory act (Gen. Stat. 1909, §§ 4676-4683) is not repealed. It remains in full force, but it cannot be invoked by an employee to whom the benefits of the workmen's compensation act (Laws 1911, chap. 218, amended by Laws 1913, chap. 216) are available, and who has elected to accept them. Where, however, the employer has elected not to accept the latter act, the L.R.A.1916A.

employee is free, notwithstanding his own acceptance, to bring an action under the factory act. *Smith v. Western States Portland Cement Co.* (1915) 94 Kan. 501, 146 Pac. 1026 (headnote by the court).

<sup>99</sup> As where the employee suffers disfigurement only, and the statute provides compensation only for loss of earning capacity. *Shinnick v. Clover Farms Co.* (1915) 169 App. Div. 236, 154 N. Y. Supp. 423.

A workman for a city contractor engaged in constructing a manhole from the surface of the street to the water pipes of the city water system is not engaged in extra-hazardous employment within the Washington statute, so as to prevent his bringing an action for damages against the third person through whose negligence he was injured. *Puget Sound Traction Light & P. Co. v. Schleif* (1915) 135 C. C. A. 616, 220 Fed. 48.

<sup>1</sup> Under § 8 of the Arizona Constitution, the legislature cannot require an employee to elect in advance of any injury or the accrual of any right of action whether he will proceed under the employers' liability act or under the compulsory compensation law; when, however, he adopts a remedy, that remedy becomes exclusive. *Consolidated Arizona Smelting Co. v. Ujack*, 15 Ariz. 382, 139 Pac. 465, 5 N. C. C. A. 742.

<sup>2</sup> *Behringer v. Inspiration Consol. Copper Co.* (1915) — Ariz. —, 149 Pac. 1065.

<sup>3</sup> *Ibid.* (Ariz.)

<sup>4</sup> *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 92 Kan. 146, 139 Pac. 1193, 5 N. C. C. A. 763.



visions of the mining act, since the Illinois compensation act is optional, and consequently does not provide for compensation to workmen for "all" injuries received in the course of their employment.<sup>5</sup>

An employee who files an application for payment out of the state insurance fund because of the injuries which he has received, exercises his option within the meaning of section 1465-61, general code, and cannot subsequently institute proceedings in any court for damages because of such injuries, notwithstanding the application blank which he made out and filed was designated by the State Liability Board of Awards as "first notice of injury and preliminary application" and under the rules of the board a subsequent application for payment out of the insurance funds must be filed.<sup>5a</sup>

The term "legal representative" as used in section 10 of the New York act which authorized in cases in which the employer fails to secure the payment of compensation for the injured employee or in case of his death is "legal representative" to claim compensation or to maintain an action for damages, means the dependent or dependents and not an executor or an administrator.<sup>5b</sup>

The right to proceed under the existing laws is by many of the statutes preserved to an employee who is injured by the negligence of the master. Cases involving only actions for damages under these provisions have not been included in this note, since they are not in any way influenced by the fact that had the employer not been negligent, the employee would have been obliged to seek compensation as his remedy.

**b. Where injury is caused by wilful or intentional act of employer.**

In some of the statutes there is a provision that the employee may pursue his

common-law remedies against the employer if the injury is caused by some act of wilfulness upon the part of the employer. The "wilful act" of the employer, which, under the Ohio act, does not prevent a recovery at common law for the resulting injury to the employee, need not be an act done with an intention to inflict injury, but the term includes acts done in utter disregard of the consequences which might follow.<sup>6</sup>

The failure to guard a circular saw so as to prevent it from throwing off slivers is an "intentional omission" within the meaning of § 3 of the Illinois act, which provides that when the injury to an employee is caused by the intentional omission of the employer to comply with safety regulations the act shall not affect the civil liability of the employer.<sup>7</sup> The failure of the corporation to guard a set screw on a revolving shaft, as required by the same section, will not take the corporation out of the protection of the act unless it is shown that the omission to guard the screw was brought home to the notice of an elective officer of the corporation.<sup>8</sup>

An employee is not estopped under the California act from claiming compensation by bringing an action for damages predicated on the employer's gross negligence or wilful misconduct, where it appeared that there was no such gross negligence or wilful misconduct; in such a case there is no election of remedies, since the employee's sole remedy was under the compensation provisions of the act.<sup>9</sup>

**c. Rights of parent where minor employee is injured.**

Under the Massachusetts act it has been held that the fact that a minor has received full compensation under the act for his injury, does not affect the right of a parent to recover for his loss because of his child's injury. The court

<sup>5</sup> Eldorado Coal & Min. Co. v. Mariotti (1914) 131 C. C. A. 359, 215 Fed. 51, 7 N. C. C. A. 966.

<sup>5a</sup> Zilch v. Bongardner (1915) — Ohio —, 110 N. E. 459.

<sup>5b</sup> Dearborn v. Peugeot Auto Import. Co. (1915) — App. Div. —, 155 N. Y. Supp. 769.

<sup>6</sup> McWeeny v. Standard Boiler & Plate Co. (1914) 210 Fed. 507, 4 N. C. C. A. 919, affirmed in 134 C. C. A. 169, 218 Fed. 361.

<sup>7</sup> Forrest v. Roper Furniture Co. (1915) 267 Ill. 331, 108 N. E. 328.

<sup>8</sup> Burnes v. Swift & Co. (1914) 186 Ill. App. 460. The court said: "It is argued by counsel for appellee [employee] with much force and plausibility, that it would be al-

most impossible to bring notice to an elective officer, and that for a party injured to be required to do so would practically render the safety appliance act nugatory. We agree with counsel that such construction places a great burden upon appellee, but it should be borne in mind that the object of the legislature in passing the compensation act was to bring every person within its provision, that it was all practical to do. It was for the legislature, and not the courts, to determine under what circumstances and conditions and for what injuries the compensation act should be adopted, and for what ones the safety act should prevail."

<sup>9</sup> In cases to which the California act is

further stated that the express provision in the act that the workman's right of action is waived or discharged by his failure to give notice that he claimed his common-law right is, by a recognized rule of statutory construction, an indication that it was not intended to take away the right of anyone but himself.<sup>10</sup> It was also held in the same case that the provision that the insurer shall pay a part of the medical expenses made necessary by injury to an employee (pt. 2, § 5) does not take away by implication the parent's remedy for his own loss in the shape of an injury to a minor child.<sup>11</sup>

*d. Rights and remedies where negligence of third person causes the injury.*

As to liability under English act of third person whose negligence caused the injury, see ante, 101.

In cases in which the injury to an employee was caused by the negligence of third persons, the employee may, under most of the acts, either bring an action against the negligent third person or take proceedings against the employer for compensation; and if the employer or his insurer is compelled to pay compensation, he may recover the amount he has been compelled to pay from the tortfeasor. This, however, is not the universal rule, and the comparatively few cases passing upon this point present several different phases of the question and a number of conflicting views.

applicable, an injured employee had no other remedy except where the injuries were caused by the employer's gross negligence or wilful misconduct of a certain specified character, and the workman cannot be held to be estopped from pursuing his remedy before the Commission, nor can the Commission be held to be without jurisdiction of the proceeding instituted by him, by the fact that, prior to instituting his proceeding before the Commission, he had instituted an action for damages in the superior court, on account of the same injuries, where the complaint in such action did not show that the injury was caused by the employer's gross negligence or wilful misconduct of the necessary character. *San Francisco Stevedoring Co. v. Pillsbury* (1915) — Cal. —, 149 Pac. 586.

<sup>10</sup> *King v. Viscoloid Co.* (1914) 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254. The court said: "The parent's right of action was not in any just sense consequential upon that of the son. It was independent of his right and was based upon her personal loss. His action was for the pain and suffering caused by the injury and for the loss of wages or diminution of earning capacity caused thereby, and coming after L.R.A.1916A.

Under the Wisconsin act, a workman injured by the negligence of a third person while on the latter's premises, where he was at work by the direction of his employer, has a right of action against such third person notwithstanding both the employer and such third person have come in under the provisions of the compensation act.<sup>12</sup> The election of remedies afforded to an employee by part 3, § 15 of the act, where the injury was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, passes in case of the death of the employee to his administrator, who is bound to decide whether to pursue the remedy under the death statute or under the workman's compensation act.<sup>13</sup>

Under the Massachusetts act, a workman loses his right to compensation from his employer where he accepts a settlement from a third person whose negligence caused the injury.<sup>14</sup> But where the workman subsequently dies of his injury, his acceptance of a settlement from such third party does not deprive the widow of her right to compensation.<sup>15</sup>

A release given to an employer by an employee upon the receipt of compensation does not, under the New Jersey act, release a tortfeasor whose negligence caused the accident.<sup>16</sup> And if a workman is injured by the negligence of a third person, he is not barred from receiving compensation by the fact that he had made a settlement with such third person and released him.<sup>17</sup> But the em-

he should have attained full age. Her action was for the expense to which she had been put by reason of his injury and for the loss of his services or wages during his minority."

<sup>11</sup> "Doubtless the parent could not recover for expenses which he had not been called on to incur, and in fact had not incurred, but it is not perceived how this could have any greater effect than to reduce somewhat the amount of damages that might be recoverable." (Mass.) *Ibid*.

<sup>12</sup> *Smale v. Wrought Washer Mfg. Co.* (1915) 160 Wis. 331, 151 N. W. 803.

<sup>13</sup> *Turnquist v. Hannon* (1914) 219 Mass. 560, 107 N. E. 443.

<sup>14</sup> The driver of a truck, who was injured by the negligence of a street car company, loses his right of compensation under the act by accepting a settlement from the street car company, although he had not brought suit against the company. *Cripps's Case* (1914) 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828.

<sup>15</sup> (Mass.) *Ibid*.

<sup>16</sup> *Jacowicz v. Delaware, L. & W. R. Co.* (1915) — N. J. —, 92 Atl. 946.

<sup>17</sup> Where a workman is injured by an accident arising out of and in the course



ployer has no right of subrogation to the claim of the workman against the tortfeasor.<sup>18</sup> Nor can he recover from such tortfeasor the compensation which he has paid to the employee.<sup>19</sup>

The right of action which the Wisconsin statute gives to the employer against a third person whose wrongdoing caused an injury to an employee is assignable, and the assignee may sue thereon in his own name.<sup>20</sup>

Where an employee is killed by the negligence of a third person, the association in which the deceased is insured may, under the Massachusetts act, enforce the right given to the employee.<sup>21</sup> This right, however, does not amount to the right of equitable subrogation.<sup>22</sup>

Under the compulsory acts of Washington and New York, no express right of action is given against the negligent third person. The supreme court of Washington has held that a workman under the law of that state has no right of action against a third person whose negligence caused the injury.<sup>23</sup> It was also held in the same case that the title of the Washington act, indicating that

it related to the compensation of injured workmen, is broad enough to include the abolition of negligence as the ground of recovery against third persons, since it indicates that the act is intended to furnish the only compensation to be allowed. But the Federal circuit court of appeals subsequently held that an employee injured by the negligence of a third person has a right of action against such third person although he has no right of action against his employer.<sup>24</sup> The Washington case was distinguished upon the ground that the third person sought to be held liable for damages was in fact the president of the employer railroad, and consequently the plaintiff in that case was attempting to hold another employee of the company liable. Nothing is made of this point in the Washington decision, but the language is general in its terms, and is in direct conflict with the decision of the Federal court. A lower New York court has also held that an injured employee may maintain an action for damages against negligent third persons.<sup>25</sup>

of his employment, and a tortfeasor other than his employer is responsible therefor, the right to compensation under the act is not lost by settlement with and release of the tortfeasor. *Newark Paving Co. v. Klotz* (1914) 85 N. J. L. 432, 91 Atl. 91, affirmed (1914) 86 N. J. L. 690, 92 Atl. 1086.

<sup>18</sup> The right to compensation under the workmen's compensation act 1911, as originally enacted, and the right to recover damages of a tortfeasor, are of so different a character that the employer has no right by way of subrogation to the claim of the workman against the tortfeasor. (*N. J.*) Ibid.

<sup>19</sup> Where an employee was injured prior to the act of 1913, through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the act of 1911, the employer cannot recover of the tortfeasor the compensation paid to the employee under the statute; the statutory compensation is a part of the compensation of the employee for services rendered for which the employer receives a quid quo, and the loss to the employer is the value of the services of the employee to him, not the necessary expense of securing them. *Interstate Teleph. & Teleg. Co. v. Public Service Electric Co.* (1914) 86 N. J. L. 26, 90 Atl. 1062, 5 N. C. C. A. 524.

<sup>20</sup> *McGarvey v. Independent Oil & Grease Co.* (1914) 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803.

<sup>21</sup> *Turnquist v. Hannon* (1914) 219 Mass. 560, 107 N. E. 443. The court said: "Where the legislature provides that the one who has afforded prompt relief to the L.R.A.1916A.

dependents of the deceased may receive the penalty, there is no legal reason why it should not be enforced."

<sup>22</sup> Part 3, § 15, simply provides that where the insurer has afforded the prompt relief to the dependents of the deceased employee which the act requires, it may enforce for its own benefit the rights against tortious third persons causing his injury which would otherwise have been available to the employee or his representative, and the section does not import into its terms the equitable principle of subrogation. (*Mass.*) Ibid.

<sup>23</sup> Any right of action which an injured employee might otherwise have had for negligence either against his employer or against a third person must be considered as having been abolished by the Washington act, which imposes upon the industry within its purview the burden arising out of injuries to their employees, and to that end withdraws all phases of the premises from private controversy regardless of questions of fault and to the exclusion of every other remedy, proceeding, and compensation except as provided by the act. *Peet v. Mills* (1913) 76 Wash. 437, post, 358, 136 Pac. 685, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786.

<sup>24</sup> *Meese v. Northern P. R. Co.* (1914) 127 C. C. A. 622, 211 Fed. 254, 4 N. C. C. A. 819, reversing 206 Fed. 222.

<sup>25</sup> Notwithstanding § 11 of the New York act states that the liability prescribed by the statute shall be exclusive, this section refers solely to the liability of the employer, and does not prevent an injured employee from seeking redress in a common-law action against third parties whose negligence caused his injury. *Lester v. Otis*

*e. Right to contract out of the statute.*

The statutes usually contain provisions prohibiting any contractual limitation of the liability to pay compensation, or any waiver on the part of the employee of his right to receive compensation prescribed by the statute. An agreement by an employee to waive his right to compensation under the New York act is not only void as against public policy, but also under the express provision of § 32 of that act.<sup>26</sup> A claim for compensation for the death of a workman is not barred by a release by the decedent in his lifetime, contained in his application for admission into the railroad relief association, and by a further release by his widow on receipt of the death benefit from said association.<sup>27</sup>

**XXXII. "Accident" and "personal injury."**

As to what constitutes "injury by accident" under the English act, see ante, 29.

Under the American statutes, which, like the English, provide for compensation for "injuries by accident," the court has given the phrase the same construction as do the English courts. The word "accident" is said to be used in its popular sense,<sup>28</sup> and has been defined as an

unlooked for and untoward event which is not expected or designed.<sup>29</sup>

In the Minnesota act, the phrase "accidental injuries" is used,<sup>30</sup> and undoubtedly would be given the same construction as is given to the term "injury by accident."

The Massachusetts statute, however, does not make use of the word "accident" in any form, but provides for compensation for "personal injury."<sup>31</sup> This term has been held to include any injury or disease which arises out of and in the course of the employment which causes incapacity for work, and thereby impairs the ability of the employee for earning wages; it is not limited to injury caused by external violence, physical force, or as the result of accident in the sense in which that word is commonly used and understood, but includes any bodily injury.<sup>32</sup>

Compensation is recoverable not only for the incapacity which is the direct effect or result of the accident or injury, but also for all incapacity which, although indirect, may be considered as the proximate physical result of it; and such proximate result need not be one which could have been reasonably anticipated, since reasonable anticipation, although an element of negligence, is not an element of physical causation.<sup>33</sup>

Elevator Co. (1915) 90 Misc. 649, 153 N. Y. Supp. 1058.

<sup>26</sup> Powley v. Vivian & Co. (1915) 169 App. Div. 170, 154 N. Y. Supp. 426.

<sup>27</sup> West Jersey Trust Co. v. Philadelphia & R. R. Co. (1915) — N. J. L. —, 95 Atl. 753.

<sup>28</sup> Boody v. K. & C. Mfg. Co. (1914) 77 N. H. 208, ante, 10, 90 Atl. 859, Ann. Cas. 1914D, 1280; Vennen v. New Dells Lumber Co. (1915) — Wis. —, post, 273, 154 N. W. 640.

<sup>29</sup> Bryant v. Fissell (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585, citing Fenton v. J. Thorley & Co. (1903) A. C. (Eng.) 443, 19 Times L. R. 684, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314.

<sup>30</sup> State ex rel. Duluth Brewing & Malt- ing Co. v. District Ct. (1915) 129 Minn. 176, 151 N. W. 912.

<sup>31</sup> "The difference between the English and Massachusetts acts in the omission of the words 'by accident' from our act which occur in the English act as characterizing personal injuries is significant that the element of accident was not intended to be imported into our act." Hurle's Case (1914) 217 Mass. 223, post, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527.

<sup>32</sup> Johnson's Case (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843.

<sup>33</sup> In Milwaukee v. Industrial Commis- sion (1915) 160 Wis. 238, 151 N. W. 247.

the court said: "Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of physical causation. As long as it was necessary to a recovery to have a negligent act stand as the cause of a injury, it did no harm to characterize causation in part, at least, in terms of negligence. But when, as under the compensation act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable anticipation, contained in the term 'proximate cause,' must be eliminated therefrom; and the phrase 'where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation which, both as to time, place, and effect, is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible human agency; under the compensation act the words 'proximately caused by accident' in terms relate to a physical



Hernia resulting from some unusual strain or exertion by the workman while acting within the scope of his employment is an accident for which compensation is recoverable.<sup>34</sup> So, the court of common pleas is justified in finding that a man's death was due to accident where, although there was some evidence that pointed to cancer and an internal rupture of some kind, the rupture occurred while the deceased was in the very act of doing some heavy work, namely, furrowing certain heavy posts, pushing them forward against the knives of the furrowing machine by pressing his abdomen forcibly against the ends of the posts.<sup>35</sup>

Under the American statutes, as under the English act, the question has arisen

fact only; namely, an accident. Hence if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation."

"An injury, to come within the compensation act, need not be an anticipated one; nor, in general, need it be one peculiar to the particular employment in which he is engaged at the time." *State ex rel. People's Coal & Ice Co. v. District Ct.* (1915) 129 Minn. 502, post, 344, 153 N. W. 119. In this case the employee was struck by lightning while standing under a tree to which he had gone, for protection, from his ice wagon which it was his duty to drive.

Death may be the result of the injury within the meaning of the Massachusetts workmen's compensation act, whether or not it was the reasonable and likely consequence of the injury. *Sponatski's Case* (1915) 220 Mass. 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

<sup>34</sup> A rupture caused by a strain while at work is an accident or untoward event arising in the course of the employment, and compensable under the workmen's compensation act. *Poccardi v. Public Service Commission* (1915) — *W. Va.* —, post, 299, 84 S. E. 242, 8 N. C. C. A. 106.

Hernia resulting from a workman attempting to move a heavy truck in the line of his employment is an injury resulting "from some fortuitous event as distinguished from the contraction of a disease" within the meaning of the Washington statute. *Zappala v. Industrial Ins. Commission* (1914) 82 Wash. 314, post, 295, 144 Pac. 54. The court said: "The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the Commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, is too refined to come with-  
L.R.A.1916A.

whether an industrial disease is an accident within the meaning of the statute. Following the English rule, it has been held that where no specific time or occasion can be fixed upon as the time when an accident happened, there is no injury by accident within the meaning of the New Jersey act.<sup>36</sup> Thus, where an employee, after ten days' service in defendant's bleachery, was affected with a rash which was pronounced to be a condition of eczema, and might be caused by acids, his injury is not "by accident" within the meaning of the New Jersey act.<sup>37</sup> So it has been held that lead poisoning is not an accident within the meaning of the Michigan act.<sup>38</sup> But under the Massachusetts act, lead poisoning has been

in the policy of the act as announced by the legislature in its adoption, and the language of the court in its interpretation." The court also said: "The rules adopted by the Commission governing hernia cases are: (1) There must be an accident resulting in hernia; (2) the hernia must have appeared just following the accident; (3) there must have been present pain at the time; (4) the applicant must show that he did not have hernia before the accident; (5) hernia coming on while a man is following his usual work is not an accident." In this case the evidence showed that the workman was in the employ of a cooperage company, and on the day of the alleged injury was pushing a heavily loaded truck; that the car ran harder than usual, and he tried three or four times to start it, but could not move it, and then put all of his strength into it, gave a jerk and hurt himself. The court said: "The evidence takes the case out of the fifth rule, showing, as we have held, that the hernia in this case resulted from a fortuitous event or accident, and is not one appearing while the workman was following his usual work without accident or fortuitous event to which the result might be directly traceable."

<sup>35</sup> *Voorhees v. Smith Schoonmaker Co.* (1914) 86 N. J. L. 500, 92 Atl. 280, 7 C. C. A. 646.

<sup>36</sup> In *Liondale Bleach, Dye, & Paint Works v. Riker* (1913) 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713, in holding that where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no injury by accident within the meaning of the act, the court said: "This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurrence of the injury, a provision which must point to a specific time."

<sup>37</sup> *Ibid.* (N. J.)

<sup>38</sup> If the Michigan act should be held to apply to occupational diseases, it would be unconstitutional under the provision of the Constitution that no law shall embrace

held to be a "personal injury."<sup>39</sup> As has been pointed out, the requirement of a statute that notice of the "accident" be given to employers within a fixed period of time indicates that the legislature had in mind something that occurred at some specific time, which would exclude occupational diseases. This inference might also be drawn with regard to the Massachusetts act, but the courts of that state had held that the same rule does not apply to the latter act,<sup>40</sup> and that the "personal injury" arises at the time when the employee becomes incapacitated.<sup>41</sup>

If a disease other than an occupational disease is the direct result of the conditions under which the workman is employed, there can be no questions but

that it is a "personal injury." Thus, an attack of optic neuritis induced by poisonous coal tar gases from furnaces which it was the workman's duty to attend, which attack resulted in total loss of vision, is a "personal injury" within the meaning of the Massachusetts act.<sup>42</sup> So, an employee who inhales damp smoke and is drenched with water, and as a result contracts lobar pneumonia and dies, may be found to have suffered a personal injury within the meaning of the Massachusetts act.<sup>43</sup> And typhoid fever contracted by an employee in drinking contaminated water furnished to him by his employer is an accident within the meaning of the Wisconsin act.<sup>44</sup> So, too, the death of a person

more than one subject, which shall be expressed in its title. *Adams v. Acme White Lead & Color Works* (1914) 182 Mich. 157, post, 283, 148 N. W. 485, 6 N. C. C. A. 482.

<sup>39</sup> *Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843.

<sup>40</sup> Blindness through optic neuritis, due to poisonous gases from a furnace about which the injured person is obliged to work, is a personal injury within the meaning of the Massachusetts act, although the statute requires that information shall be given as to the time, place, and cause of the injury, as soon as practical after it is suffered, and that the employer shall make return of an accident resulting in any injury. *Hurle's Case* (1914) 217 Mass. 223, post, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527.

<sup>41</sup> Although it was found that a lead grinder had been absorbing lead poisoning into his system for twenty years, the Industrial Accident Board is justified in finding that the injury arose at the time when he became incapacitated for work because of the poison. *Johnson's Case* (Mass.) supra.

<sup>42</sup> In *Hurle's Case* (Mass.) supra, the court said: "The English workmen's compensation act affords compensation only where the workman receives 'personal injury by accident.' It adds to the personal injury alone required by our act the element of accident. Yet it has been held frequently that disease induced by accidental means was ground for recovery; as, for example, a rupture resulting from over-exertion (*Fenton v. J. Thorley & Co.* [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684); infection of anthrax from a bacillus from wool which was being sorted (*Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137); heat from a furnace (*Ismay I. & Co. v. Williamson* [1908] A. C. (Eng.) 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 821, 52 Sol. Jo. 713); sunstroke (*Morgan L.R.A.* 1916A.

*v. The Zenaida* (1909) 25 Times L. R. 446, 2 B. W. C. C. 19); pneumonia induced by inhalation of gas (*Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. C. C. 417). See also *Brown v. George Kent* [1913] 3 K. B. (Eng.) 624, 82 L. J. K. B. N. S. 1039, 109 L. T. N. S. 293, 29 Times L. R. 702, 6 B. W. C. C. 745, and *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, 4 N. C. C. A. 899. We lay these cases on one side, however, because it is plain from the third schedule of Stat. 6 Edw. VII. chap. 58, that certain occupational diseases were intended to be included within the English act."

<sup>43</sup> *Re McPhee* (1915) — Mass. —, 109 N. E. 633.

<sup>44</sup> *Vennen v. New Dells Lumber Co.* (1915) — Wis. —, post, 273, 154 N. W. 640. The court said: "The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not, in the sense of the statute, constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfil the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence while he was performing services growing out of and incidental to his employment." It is alleged that the conse-



employed to cut grass on the railroad right of way by infection from poison ivy is accidental within the meaning of the New York statute.<sup>45</sup>

Compensation is also recoverable where a disease is a direct result of the accident,<sup>46</sup> or where it supervenes after an accident, and further incapacitates the employee, where, but for the accident, the disease would not have been contracted.<sup>47</sup>

Blood poisoning directly traceable to the accident is the proximate result thereof, and compensation is recoverable for incapacity or death resulting therefrom.<sup>48</sup> But where it is found that the wound was healing, and that the blood poisoning was caused by an independent intervening cause, no compensation is recoverable for the added incapacity resulting from that intervening cause.<sup>49</sup>

That the employee was in a debilitated condition, or was suffering from some disease at the time of the accident, so

that the accident resulted in his death, while it would have had less serious results had the employee been a normally healthy man, does not prevent his dependents from recovering compensation for his death. Thus, acceleration of previously existing heart disease to a mortal end sooner than it would have come otherwise is an injury within the meaning of the act.<sup>50</sup> So, a workman's death may be held to be the result of an injury where, after working hard during the forenoon at heavy labor, he attempted to carry bags of coal, weighing approximately 150 to 200 pounds, and, in attempting to lift one, fell to the ground and died immediately or shortly thereafter, and there was expert testimony to the effect that a few years before he had suffered from acute articular rheumatism, and that an affection of the valves of the heart ordinarily followed cases of acute inflammatory rheumatism.<sup>51</sup>

quences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while 'performing services growing out of and incidental to his employment' are injuries within the contemplation of the workmen's compensation act."

<sup>45</sup> *Plass v. Central New England R. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 854.

<sup>46</sup> The supreme court will not reverse the findings of fact that the death of an employee was due to injury arising out of and in the course of his employment, where the employee died of pneumonia, and there was expert evidence to the effect that the direct cause of the pneumonia was a hurt or strain of the back suffered by the deceased about two weeks before his death, although such expert evidence was flatly contradicted by other expert evidence. *Bayne v. Riverside Storage & Cartage Co.* (1914) 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837.

<sup>47</sup> Where an employee's arm was broken while he was in the defendant's employ, and was treated at a hospital where the fracture properly united, but there developed an abscess upon the fleshy part of the thumb, which resulted in ankylosis of the thumb, making it permanently useless, the injury of the thumb was an injury arising by accident out of and in the course of his employment. *Newcomb v. Albertson* (1913) 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783. The court said: "We cannot assume that the infection could be caused only by the negligence of the physician, and it is therefore unnecessary to decide whether such negligence would amount to such a break in the chain of causation that the employer would not be liable."

<sup>48</sup> Disability resulting from blood poisoning. *L.R.A.1916A.*

ing may be found to be the proximate result of an injury to the hand of an employee which bruised the flesh and knocked a small piece of the skin off the back of the hand, where the time that transpired between the abrasion and the beginning of the pain was the usual period of infection of one form of the disease commonly termed "blood poisoning." *Great Western Power Co. v. Pillsbury* (1915) — Cal. —, post, 281, 151 Pac. 1136.

The accident, and not blood poisoning, will be held to be the proximate cause of the death of an employee who received a fracture of the spine which necessitated his lying in bed in one position, and by reason of this an extensive bed sore was developed, which extended and grew worse until it brought about the blood poisoning that was the immediate cause of his death. *Re Burns* (1914) 218 Mass. 8, 105 N. E. 601.

<sup>49</sup> The aggravation by a boxing match of a wound received in the course of the employment, which had practically healed, and would have caused no further trouble had it been given a little more rest, so that blood poisoning and permanent injuries to the hand result, is a proximate cause of such injury, and no recovery can be had under the Wisconsin act. *Kill v. Industrial Commission* (1915) 160 Wis. 549, ante, 14, 152 N. W. 148.

<sup>50</sup> *Brightman's Case* (1914) 220 Mass. 17, post, 321, 107 N. E. 527, 8 N. C. C. A. 102, citing *Wiemert v. Boston Elev. R. Co.* (1914) 216 Mass. 598, 104 N. E. 360; *Clover, C. & Co. v. Hughes* [1910] A. C. (Eng.) 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885.

<sup>51</sup> *Fisher's Case* (1915) 220 Mass. 581, 108 N. E. 361.

And the dependents of a school principal whose death was caused by a blow on the head from a basket ball may recover compensation although the deceased was suffering from an advanced stage of arterial sclerosis at the time he was injured, and had he not been so suffering, the blow he received would, in all probability, have caused no serious injury.<sup>52</sup>

Likewise it has been held that compensation is recoverable where the man's incapacity is the direct result of an injury, although such incapacity is largely subjective, he apparently not having the will power to throw off the after-effects of the injury to the extent which his physical condition warrants.<sup>53</sup>

An employee of a mill company, who is drowned while cleaning rubbish out of a flume, suffers death by accident.<sup>54</sup>

The fact that the injury was the result of a wilful or criminal assault by another does not exclude the possibility that the injury was caused by accident.<sup>55</sup> So, an employee who was shot while attempting to remove an intruder from the factory in which he was employed suf-

fered "personal injury" within the meaning of the Massachusetts act.<sup>56</sup>

An injury is none the less an accident because it was occasioned by a sportive act of a fellow employee.<sup>56a</sup>

In one case, the Wisconsin court rejected the contention of the employer that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the compensation act.<sup>57</sup>

Where the common pleas judge found as a fact that the decedent was killed "by a heavy bar of metal falling upon his head from one of the upper stories" of the building upon which he was at work, and that the falling of the bar was caused by another fellow workman, the decedent's death was caused by "an accident" within the purview of the act.<sup>58</sup>

The burden of proving that there was an accident which caused the injury in question is upon the petitioner,<sup>59</sup> and an award cannot stand which is based merely upon conjecture.<sup>60</sup> That the injury was caused by accident, however, may be shown by circumstantial evidence.<sup>61</sup>

<sup>52</sup> *Milwaukee v. Industrial Commission*, (1915) 160 Wis. 238, 151 N. W. 247.

<sup>53</sup> Where a workman is partially incapacitated for work by reason of a condition of hysterical blindness and neurosis, he is entitled to compensation if such injuries flow as a proximate result from an actual physical impact, although slight, received by him in the course of and arising out of his employment, although apparently he did not have sufficient will power to throw off the condition and go to work, as his physical capacity amply warranted him in doing. *Hunnewell's Case* (1915) 220 Mass. 351, 107 N. E. 934.

<sup>54</sup> *Boody v. K. & C. Mfg. Co.* (1914) 77 N. H. 208, ante, 10, 90 Atl. 859.

<sup>55</sup> *Western Indemnity Co. v. Pillsbury* (1915) — Cal. —, 151 Pac. 398 (section foreman assaulted by member of gang who had been discharged).

In *McNicol's Case* (1913) 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522; compensation was allowed for injuries caused by an assault of an intoxicated fellow workman, but the case turned upon the question whether the injury was received in the course of the employment, and not whether it was such an injury as to entitle the workman to compensation.

<sup>56</sup> *Re Reithal* (1915) — Mass. —, post, 304, 109 N. E. 951.

<sup>56a</sup> *De Fillipis v. Falkenberg* (1915) — App. Div. —, 155 N. Y. Supp. 761.

<sup>57</sup> *Vennen v. New Dells Lumber Co.* (1915) — Wis. —, post, 273, 154 N. W. 640. The court said: "In the popular sense the words as used in the compensation act referring to a personal injury accidentally sustained by an employee while performing services growing out of and incidental to L.R.A.1916A.

his employment include all accidental injuries, whether happening through negligence or otherwise, except those intentionally self-inflicted."

<sup>58</sup> *Bryant v. Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

<sup>59</sup> The burden of proving that death was caused by accident arising out of and in the course of the employment is upon the petitioner; and where the physician in attendance refuses to state that death was caused by the accident, there is no basis or inference to that effect by the court. *Reimers v. Proctor Pub. Co.* (1913) 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738.

<sup>60</sup> Where a workman employed in building a bridge over a river near its outlet in a bay was last seen alive at his home some miles from the place of work, and two hours before he was to return to his work, and his body was afterwards found in the bay, and there was no evidence as to how he met his death, it may properly be inferred that he came to his death by accident, but not that the accident arose out of his employment. *Steers v. Dunnewald* (1913) 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676.

<sup>61</sup> An accident may be inferred where an employee was found dead under a train of cars with a hole of about 6 inches in diameter in his abdomen, where there is nothing from which self-destruction can be inferred, and the size of the wound indicates that the injury was caused by some unknown happening. *De Fazio v. Goldschmidt Detinning Co.* (1913) — N. J. L. —, 88 Atl. 705, 4 N. C. C. A. 716.

Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second



Whether or not the injury was caused by "accident" is generally considered to be a question of fact; and the findings of the Commission or trial court will not be disturbed if there is some evidence to support such finding.<sup>62</sup> But it has been said that the question whether or not the injury to the employee is an accident within the purview of § 2 of the New Jersey act is a mixed question of law and fact; when applied to a certain state of facts, it is a question of law.<sup>63</sup>

**XXXIII. Injuries "arising out of and in the course of" the employment.**

For the English decisions construing this phrase, see ante, 40.

Practically all of the American statutes provide compensation in case of "injury" or "injury by accident" "arising out of and in the course of the employment." This phrase is borrowed

day thereafter, death from surgical operation for relief thereof, and the opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment within the meaning of the West Virginia act. *Poccardi v. Public Service Commission* (1915) — **W. Va.** —, post, 299, 84 S. E. 242.

The Industrial Commission is justified in indulging the presumption that a workman whose body was found in a river did not commit suicide. *Milwaukee Western Fuel Co. v. Industrial Commission*, 159 **Wis.** 635, 150 N. W. 998.

Where, by an agreement between an employer and an employee, it was stated that the injury to the employee's right eye was caused by molten iron being splashed into it, causing a bad burn, the employer is estopped from subsequently claiming that the defect in the eye at the time of the order approving the agreement was the result of senile cataract. *Spooner v. Beckwith* (1914) 183 **Mich.** 323, 149 N. W. 971.

<sup>62</sup> The findings by the Industrial Accident Board, upon a petition to review, will not be reversed unless the petitioners have conclusively shown by their evidence that the injury to the employee's eye was caused by senile cataract, and not by traumatism. (*Mich.*) *Ibid.*

<sup>63</sup> *Bryant v. Fissell* (1913) 84 **N. J. L.** 72, 86 **Atl.** 458, 3 **N. C. C. A.** 585.

<sup>64</sup> The language of the New Jersey act of 1911 with reference to the recovery of compensation where an employee is injured by accident arising out of and in the course of his employment is identical with the language of the British workman's compensation act of 1906, and therefore cases in that jurisdiction, construing the language in that act, will be useful in construing the same language in the New Jersey act. *Bryant L.R.A.* 1916A.

from the English workmen's compensation act.<sup>64</sup>

The terms "out of" and "in the course of" are not synonymous,<sup>65</sup> and if either of these elements is missing, there can be no recovery.<sup>66</sup> The two questions are to be determined by different tests.<sup>67</sup> The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred.<sup>68</sup> So it has been said that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises "out of and in the course of the employment."<sup>69</sup>

It has been said that under the New Jersey act an accident which is the result of a risk reasonably incident to the employment is an accident arising out of the employment,<sup>70</sup> and that the injuries for which compensation is to be paid under the Wisconsin act are such

*v. Fissell* (1913) 84 **N. J. L.** 72, 86 **Atl.** 458, 3 **N. C. C. A.** 585.

<sup>65</sup> "An injury may be received in the course of the employment and still have no causal connection with it, so that it can be said to arise out of the employment." *State ex rel. Duluth Brewing & Malting Co. v. District Ct.* (1915) 129 **Minn.** 176, 151 **N. W.** 912.

<sup>66</sup> *McNicol's Case* (1913) 215 **Mass.** 497, post, 306, 102 **N. E.** 697, 4 **N. C. C. A.** 522; *Bryant v. Fissell* (**N. J.**) supra.

<sup>67</sup> *Hopkins v. Michigan Sugar Co.* (1915) — **Mich.** —, post, 310, 150 **N. W.** 325.

<sup>68</sup> *Hills v. Blair* (1914) 182 **Mich.** 20, 148 **N. W.** 243, 7 **N. C. C. A.** 409; *Hopkins v. Michigan Sugar Co.* (**Mich.**) supra.

<sup>69</sup> *Scott v. Payne Bros.* (1914) 85 **N. J. L.** 446, 89 **Atl.** 927, 4 **N. C. C. A.** 682.

An accident arises "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do in the time during which he is reasonably employed, and at a place where he may reasonably be during that time; and it arises "out of" the employment when it is something the risk of which may have been contemplated by a reasonable person when entering the employment as incidental thereto. *Bryant v. Fissell* (**N. J.**) supra.

"It is sufficient to say that an injury is received 'in the course of' the employment, when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *McNicol's Case* (**Mass.**) supra.

<sup>70</sup> *Hulley v. Moosbrugger* (1915) — **N. J. L.** —, 93 **Atl.** 79.

as are incident to and grow out of the employment.<sup>71</sup>

A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment.<sup>72</sup> If a locomotive engineer who slipped while standing on an apron of metal between the engine and the tender, fell because the apron was smooth and unsteady, then his fall is clearly the result of a hazard incident to his employment, and is an industrial accident for which indemnity may be recovered under the provisions of the workmen's compensation act.<sup>73</sup> The accidental drowning of an employee, or his fall onto the rocks in the river bed while engaged in the duty of clearing debris from the rack protecting the flume which carries the water from the dam to the mill in which he is employed, is within the New Hampshire act.<sup>74</sup>

Whether or not the injury is one "arising out of and in the course of the employment" within the meaning of the

compensation act is not to be determined by the common-law rules in negligence cases.<sup>75</sup>

That the injury was caused by the negligence of a fellow servant is not a defense to proceedings for the recovery of compensation; consequently it has been held that the disobedience by a fellow workman of orders is as much one of the risks of a man's employment as a defect in the mechanical appliances.<sup>76</sup> So, too, compensation is recoverable although the injuries were caused by the negligence of third persons.<sup>77</sup>

In order that an injury or accident should "arise out of and in the course of" the employment, it is not necessary that it should be one reasonably to be anticipated as an incident of the employment.<sup>78</sup>

Risks to which all persons, whether in the employment or not, are subject, cannot be said to be incidental to the employment. Thus, injuries caused by slipping on the street while going from one place to another are not within the protection of a statute.<sup>79</sup>

In one case it has been held that com-

<sup>71</sup> *Hoenig v. Industrial Commission* (1915) 159 Wis. 646, post, 339, 150 N. W. 996, 8 N. C. C. A. 192.

<sup>72</sup> *Bryant v. Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

<sup>73</sup> *Milwaukee Coke & Gas Co. v. Industrial Commission* (1915) 160 Wis. 247, 151 N. W. 245.

<sup>74</sup> *Boody v. K. & C. Mfg. Co.* (1914) 77 N. H. 208, ante, 10, 90 Atl. 860, Ann. Cas. 1914D, 1280.

<sup>75</sup> The fact that, before the passage of the workmen's compensation act, an employee in a shop could not recover from her employers for injury received while on a stairway in the building, which was not controlled by her employers, is not controlling in proceedings brought under the compensation act, since one of the very purposes of the act was to increase the right of employees to be compensated for injuries growing out of their employment. *Sundine's Case* (1914) 218 Mass. 1, post, 318, 105 N. E. 433, 5 N. C. C. A. 616.

<sup>76</sup> A petitioner who, with two others, was pulling on a hand chain connected with a block operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder, and who was injured by the lift chain becoming blocked and splitting the block, was injured by accident arising out of and in the course of the employment, although the injury was caused by the disobedience of fellow workmen in continuing to pull on the chain after they had been directed by the foreman to stop. *Scott v. Payne Bros.* (1914) 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682.

<sup>77</sup> The New Jersey act nowhere provides specifically or by implication that an em-

ployee shall be deprived of his right to compensation thereunder, merely because the accident gives rise to a right of recovery against the third person. *Bryant v. Fissell* (N. J.) supra.

<sup>78</sup> Under the compensation act it is of no significance whether the prescribed physical harm was natural and probable, or the abnormal or inconceivable consequence of the employment, the only inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether it was the reasonable and likely consequence or not. The only question is whether in fact death "results from the injury." *Sponatski's Case* (1915) 220 Mass. 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

<sup>79</sup> An employee of a sugar company, whose duty required him to inspect plants in different places, is not, after his return from a tour of inspection to his own city, within his employment when injured by slipping upon the ice while running to get a street car to return to his home, so as to render his employers liable to compensation, since the danger of slipping upon the street is not a hazard incidental to the employment of those who are called upon to make journeys between towns on business missions. *Hopkins v. Michigan Sugar Co.* (1915) — Mich. —, post, 310, 150 N. W. 325.

In *Milwaukee v. Althoff* (1914) 156 Wis. 68, post, 327, 145 N. W. 238, 4 N. C. C. A. 110, compensation was allowed for the death of an employee caused by injuries received while going from the place where he received orders to the place where he was to work, which injuries were caused by his falling on the street and injuring



pensation is recoverable where the duty which the employee was performing was owed by him to others as well as to his master.<sup>80</sup> It is the work which the workman is doing at the time of his injury that determines whether or not his injury arises out of and in the course of the employment, and not what he is about to do after the completion of the task in hand.<sup>81</sup>

Injuries self-inflicted or otherwise, suffered by an employee because of a derangement of his mind, arise "out of and in the course of his employment" where his mental aberration is caused by

his knee. From the language used by the court, however, it is apparent that the court decided that such injuries were received "in the course of" the employment, and it does not appear that the court determined the further question whether they arose "out of" the employment.

An injury to a motorman who had closed his day's work and had signed his name to the register denoting that fact, and who was injured while on the public street on his way to have his watch tested, by being run down by an automobile not under the control of the employer, does not arise out of and in the course of his employment. *De Voe v. New York State R. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 12.

There can be no compensation for the death of a workman, caused by falling on a pail of broken glass while he was walking along the street, delivering meat from his employer's shop, although his usual occupation was a hazardous one within the meaning of the New York statute. *Newman v. Newman* (1915) — App. Div. —, 155 N. Y. Supp. 665.

But a truck driver's helper, who, in order to drive away some boys who were hanging on the rear of a truck, jumped off the truck, and, in doing so, fell to the pavement, fracturing his skull, suffered injury by accident arising out of and in the course of his employment. *Hendricks v. Seeman* (1915) — App. Div. —, 155 N. Y. Supp. 638.

<sup>80</sup> Injuries caused by being drenched with water and saturated with smoke, received by an employee in charge of his employer's volunteer fire brigade while assisting in extinguishing a fire in a garage, situated but 40 feet distant from his employer's premises, may be found to "arise out of" the employment, where the workman entered the burning garage with the employer's chemical engine before the arrival of the town apparatus, although he subsequently worked in connection with the fire apparatus of the town. *Re McPhee* (1915) — *Mass.* —, 109 N. E. 633. The court said: "While the deceased was a member of the town fire department, and as such required to attend the fire, it well might be that his paramount duty was owed to the subscriber to protect its property from destruction by

an injury which arose out of and in the course of the employment.<sup>82</sup> But if the injury for which compensation is sought was caused by his mental condition which was not in any way the result of his employment, then no compensation is recoverable, although the injury arose in the course of the employment.<sup>83</sup>

An employee is not entitled to compensation for the loss of an eye although several pieces of steel lodged in it while he was at work at a lathe, where the loss of the eye was immediately caused by rubbing the eye with

fire and to prevent thereby a panic among its patrons and the disaster which might ensue. It does not seem to us possible to say as matter of law that when he had exhausted the chemical of the subscriber and begun working in connection with the fire apparatus of the town, he ceased acting primarily in the interests of his employer, who was the subscriber, and began working exclusively for the town."

<sup>81</sup> A workman employed to drive a horse and a cart is not outside of his employment while driving the horse to a watering trough, as it was his duty to do, although, after the horse had been watered, he intended to use it for his own purposes. *Pigeon's Case* (1913) 216 *Mass.* 51, 102 N. E. 932, *Ann. Cas.* 1915A, 737. The court said: "Though he may have had at the same time the purpose to do something else not within the scope of his employment, after watering the horse, that fact does not prevent the service actually rendered at the moment from being in the course of his employment. His custody of the horse for the purpose of relieving his thirst was in the performance of the business of his general employer. His service in doing this was not destroyed by his unexecuted intention to abandon his master's business after performing this duty and to take the horse for his own convenience on a journey of his own."

<sup>82</sup> Compensation is recoverable under the workmen's compensation act for death of a workman by throwing himself from a window as a result of injuries arising out of and in the course of his employment which deranged his mind so as to create an irresistible impulse to commit the act which caused his death. *Sponatski's Case* (1915) 220 *Mass.* 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

<sup>83</sup> Pneumonia, contracted by an employee who, because of prior injury, suffered a loss of memory while in charge of his master's team and, in attempting to get the horses to the stable, wandered from the wagon into a swamp, and suffered exposure during the night, is not an injury "arising out of" his employment within the meaning of the act. *Milliken's Case* (1914) 216 *Mass.* 293, post, 337, 103 N. E. 898, 4 N. C. C. A. 512.

his hand infected with an infectious disease from which he was suffering at the time of the injury.<sup>84</sup>

As a general rule, accidents which befall an employee while going to or from his work are not to be regarded as in the course of or arising out of his employment.<sup>85</sup> But undoubtedly such accident might be brought within the scope of the employment by the terms of the contract of employment.<sup>86</sup> It has been held that where an employee is injured while traveling to or from his work in a vehicle provided by the employer, the latter's liability depends upon whether the conveyance has been provided by him after the real beginning of the employment, in compliance with one of

the implied or express terms of the contract of the employment, for the mere use of the employee, and is one which the employees are required, or, as a matter of right, are permitted, to use by virtue of that contract.<sup>87</sup>

It is not necessary, however, that the hour of work shall have arrived and that the work shall have been actually begun.<sup>88</sup> On the one hand it has been held that it is not a sufficient test that the workman should be on the premises of the employer,<sup>89</sup> while, on the other hand, the circumstance that the deceased employee was not upon the estate of his employer at the time of receiving his injury has been said to be of slight significance.<sup>90</sup> An employee in a shop

<sup>84</sup> *McCoy v. Michigan Screw Co.* (1914) 180 Mich. 454, post, 323, 147 N. W. 572, 5 N. C. C. A. 455.

In connection with this case, see Voelz v. Industrial Commission (1915) — Wis. —, 152 N. W. 830, cited in note 22, *infra*.

<sup>85</sup> *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

<sup>86</sup> An injury incurred by a workman in the course of his travel to his place of work, and not on the premises of the employer, does not give right to participation in the compensation fund, unless the place of injury was brought in the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and returning from his work. *De Constantin v. Public Service Commission* (1914) — W. Va. —, post, 329, 83 S. E. 88. In denying compensation, the court said: "If it had been shown that the decedent, approaching his place of work by the only means of access thereto, was almost within the reach of it at the time of his injury, some of the authorities relied upon might justify the allowance of the claim; for the employment is not limited to the exact moment of arrival at the place of actual work, nor to the moment of retirement therefrom. It includes a reasonable amount of time before and after actual work. . . . But, on the contrary, if the employee at the time of the injury has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it in the scope thereof."

Where an employee was killed on returning home at the close of a day's work, upon a railroad track, where he was struck by a train, the employer is not liable for compensation, where the contract of employment did not provide for transportation or that he should be paid for the time taken in going and returning to his place of employment, and it appeared that when the day's work had ended the employee was free to do as he pleased. *Fumiciello's Case* (1914) 219 Mass. 488, 107 N. E. 349.

<sup>87</sup> Where a workman was employed to L.R.A.1916A.

clean out catch basins at a place about 2 miles distance from his home, and was injured while riding home on a wagon furnished by the employer, he is entitled to compensation where, with the knowledge and consent of the employer, the workman, together with other employees, was accustomed to ride to and from the vicinity of the catch basin in a wagon furnished by the employer, the wagon meeting the employees on the street, and the employer being notified if any of the employees failed to report for work at the beginning of the day, and the wagon was at the service of the employees at the end of the day, and they might ride back in it to the employer's barn if they wished. *Donovan's Case* (1914) 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549.

<sup>88</sup> In applying the general rule that the period of going to and returning from work is not covered by the act, it is to be remembered that employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when it ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

An injury to a city employee, who, after reporting according to custom for instructions as to where he is to work during the day, falls on the sidewalk while on his way toward such place, grows out of and is incidental to his employment within the meaning of the Wisconsin act, although the accident occurs before the hours when his regular duties for the day begin. *Milwaukee v. Althoff* (1914) 156 Wis. 68, post, 327, 145 N. W. 238, 4 N. C. C. A. 110.

<sup>89</sup> *Hills v. Blair* (Mich.) *supra*.

<sup>90</sup> Injuries caused by inhaling smoke and by being drenched with water may be found to have been received "in the course of" the employment of a workman who was employed as a superintendent of an amusement park, and was in charge of his employer's volunteer fire brigade, and was also a member of the town fire department, and received the injuries while assisting to ex-



may recover for injuries received on a stairway, although her employer did not have control of the stairway, which was under the control of the owner of the building.<sup>91</sup>

An employee sent to repair water mains between the tracks of a railroad is not outside of his employment in going to a hand car ten steps away to put on rubber boots, where that was the only place except the ground that he could sit on in order to put on boots and he had been told to bring the boots with him, and he could perform his work better when wearing them.<sup>91a</sup>

That an injury should arise "out of and in the course of the employment," it is not necessary that the employee be

actively employed at the time of the injury.<sup>92</sup> Thus, a workman exposed to severe weather, and injured while warming himself, may be found to have been injured by accident "arising out of and in the course of his employment."<sup>93</sup> So, an injury may be found to "arise out of and in course of" the employment of a workman, where it is received while he is seeking shelter from a storm and at a place away from the immediate scene of his place of work.<sup>94</sup> (But see the "lightning cases" cited in notes 18-20, infra.) And injuries received while necessarily crossing a street to seek toilet facilities arise "out of and in the course of the employment."<sup>95</sup> So an employee in a factory is still in the employ of the

to run into him while he was warming himself."

tinguish a fire in a garage, situated but 40 feet distant from his employer's premises, although, after the employer's chemical engine gave out, he began working in connection with the fire apparatus of the town department. *Re McPhee* (1915) — *Mass.* —, 109 N. E. 633.

The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed. *Milwaukee v. Althoff* (Wis.) *supra*.

<sup>91</sup> An injury to one employed by the week, while leaving the premises for the purpose of procuring a luncheon, by means of stairs which are not under the employer's control, but afford the only means of going to and from the workroom, arises out of and in the course of the employment. *Sundine's Case* (1914) 218 *Mass.* 1, post, 318, 105 N. E. 433, 5 N. C. C. A. 616.

<sup>91a</sup> *Brown v. Decatur* (1914) 188 *Ill. App.* 147.

<sup>92</sup> Employment within the meaning of the statute refers rather to the contract than to the labor done in pursuance of the contract, and an employee does not cease to be an employee because of certain instants of time he is not actually engaged in work. *Scott v. Payne Bros.* (1914) 85 N. J. L. 446, 89 *Atl.* 927, 4 N. C. C. A. 682.

<sup>93</sup> An employee engaged in dumping hot iron briquettes from cars running untended from the mills into the yards, whose duty involved periods of leisure during which he apparently was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait, does not go out of his employment when, upon a cold night he put off dumping the car until he could warm himself from its heated contents. *Northwestern Iron Co. v. Industrial Commission* (1915) 160 *Wis.* 633, 152 N. W. 416. The court said: "To protect himself from undue and unnecessary exposures to the cold was a duty he owed his master as well as himself, and it does not follow that he left his master's employment because he negligently allowed a second car

to run into him while he was warming himself."

<sup>94</sup> A lineman who seeks shelter from the storm under some cars on a switch, and is injured by the cars being moved by an engine on another railroad, is injured by accident arising out of his employment, where the employer furnished no shelter, but left each man to find shelter as he could in the storm, and made no deduction of wages for the interference in the work. *Moore v. Lehigh Valley R. Co.* (1915) 169 *App. Div.* 177, 154 N. Y. *Supp.* 620.

<sup>95</sup> Where the employer failed to provide proper toilet facilities for employees in the building where they were at work, so that they were obliged to and did habitually resort for such facilities during the working hours to another building of the employer which lay across a public street, and which custom persisted for a considerable time, and as the court was entitled to find, was therefore known and consented to by the employer, a workman while crossing the street in working hours to reach the toilet in question, who was struck by a passing vehicle, sustaining injuries which caused his death, may be found to come to his death by accident which arose out of and in the course of his employment. *Zabriskie v. Erie R. Co.* (1914) 86 N. J. L. 266, post, 315, 92 *Atl.* 385, affirming judgment of the Supreme Court, 85 N. J. L. 157, 88 *Atl.* 824, 4 N. C. C. A. 778. The supreme court pointed out that this was the only toilet provided by the defendant, and that it was the practice of the operatives in the shop where the deceased was at work, presumptively with the knowledge and consent of the defendant, to temporarily leave their employment when the necessity arose, and to make use of the toilet in question. The court concluded its argument as follows: "Therefore we must conclude that it was within the contemplation of both parties to the employment that such an exigency was an incident which ex necessitate inhered in the terms of the contract, and for the damages arising out of which the defendant must respond within the contemplation of the statute."

master while accepting the conveniences of a toilet maintained by the employer.<sup>95a</sup> Preparation for beginning active employment, after the place of work has been reached, and for leaving the premises after the period of active employment has ended, is part of the employment. Thus, an injury to an employee by collision with another employee hidden from view by an obstruction in running to register on a time clock, which he was required to do before leaving the building, when the quitting signal was given, arises out of and in the course of his employment.<sup>96</sup> And a factory employee who quits work at her machine shortly before noon, and is, in accordance with custom, combing particles of wool out of her hair preparatory to going home, when her hair is caught in other machinery and she is injured, suffers injury by accident arising out of and in the course of her employment.<sup>97</sup>

An employee in a mill is not outside the scope of her employment in going from an upstairs room, where her work had run out, to a room down stairs, where she had been told by the overseer that there was work for her to do.<sup>98</sup> And an employee by the week in a shop does not go outside of the employment merely because she leaves the shop for the purpose of getting a lunch.<sup>99</sup> But the Michigan court has held that an employee who leaves his place of employment to go home to his lunch is going on a mission of his own merely to please himself, and that injuries incurred while so going to his lunch do not arise out of and in the course of his employment, although at the time they occurred the workman is still upon the employer's premises.<sup>1</sup>

In one case it has been held that an employee on a vessel does not necessarily abandon his employer's service in attempting to save his personal effects

<sup>95a</sup> *De Filippis v. Falkenberg* (1915) — App. Div. —, 155 N. Y. Supp. 761.

<sup>96</sup> *Rayner v. Sligh Furniture Co.* (1914) 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851.

<sup>97</sup> *Terlecki v. Strauss* (1914) 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584, affirmed in 86 N. J. L. 708, 92 Atl. 1087. The court said: "The preparation reasonably necessary for beginning work after the employer's premises are reached, and for leaving when the work is over, is a part of the employment. A workman is none the less in the course of his employment because he is engaged in changing his street clothes for his working clothes, or in changing his working clothes for his street clothes. In the present case it was reasonably necessary that the petitioner should comb her hair and remove the particles of wool before leaving the factory."

<sup>98</sup> *Wheeler v. Contoocook Mills Corp.* (1915) — N. H. —, 94 Atl. 265.

<sup>99</sup> In *Sundine's Case* (1914) 218 Mass. 1, post, 318, 105 N. E. 433, it was held that a girl employed in a shop who was employed by the week, does not go outside of the employment merely because she leaves the shop for lunch. The court said: "The decisions upon similar questions under the English act are to same effect. *Blovelt v. Sawyer* [1904] 1 K. B. (Eng.) 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, which went on the ground that the dinner hour, though not paid for, was yet included in the time of employment. *Moore v. Manchester Liners* [1910] A. C. (Eng.) 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527, where the House of Lords reversed the decision of the court of appeal, reported in [1909] 1 K. B. 417, 78 L. J. K. B. N. S. 463, 100 L. T. N. S. 164, 25 Times L. R. 202, and held, follow-  
L.R.A.1916A.

ing the dissenting opinion of Moulton, L. J., that a temporary absence by permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that an injury occurring during such a temporary absence arose 'out of and in the course of' the employment. *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. (Eng.) 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42; *Keenan v. Flemington Coal Co.* 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th Series, 164, 10 Scot. L. T. 409; *MacKenzie v. Coltness Iron Co.* 41 Scot. L. R. 6."

<sup>1</sup> An employee who, contrary to his usual custom, left his place of employment and his fellow workman at the noon hour to go home to his lunch, because, upon this occasion, he had failed to bring with him his dinner, as was customary with the crew, and as he had always done before, was not, while so going to his dinner, in the employment, although at the time of his injury, he was still upon his employer's premises. *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

<sup>2</sup> Where a cook on a lighter, upon the craft beginning to sink, made several trips to and from the deck in an attempt to save some of his clothes and other belongings, and accelerated a previously existing heart disease, so that his death ensued, his dependents are entitled to compensation, as it cannot be found that his injury arose outside of his employment. *Brightman's Case* (1914) 220 Mass. 17, post, 321, 107 N. E. 527, 8 N. C. C. A. 102. The court said that the standard to be applied is not that which now, in the light of all that has happened, is deemed to have been directly within the line of labor helpful to the master, but that which the ordinary man, unaccustomed to act in such an emergency,



when the craft began to sink.<sup>2</sup> So, an employee is not outside the scope of his employment while attempting to rescue a fellow workman from a danger which has arisen out of the latter's employment.<sup>3</sup>

It has been held that an injury to an employee, which was proximately caused by his voluntary intoxication, does not relieve the employer from liability therefor under the Wisconsin statute, which makes the employer liable for injury approximately caused by accident, and not by wilful misconduct.<sup>4</sup>

Additional incapacity caused by the failure of a workman to take proper care of himself cannot be said to arise "out of and in the course of the employment."<sup>5</sup> But if the workman has proved the liability of the employer and the resulting injuries to the employee, and the

might do while actuated by the purpose to do his duty.

<sup>3</sup> In *Dragovich v. Iroquois Iron Co.* (1915) — Ill. —, 109 N. E. 999, it was held that a workman does not go out of his employment in attempting to rescue a fellow workman who has fallen into a quantity of hot water. The court said: "It is the duty of an employer to save the lives of his employees if possible when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees, when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of the injuries to their employees."

<sup>4</sup> *Nekoosa-Edwards Paper Co. v. Industrial Commission* (1913) 154 Wis. 105, post, 348, 141 N. W. 1013, Ann. Cas. 1915B, 995.

<sup>5</sup> The aggravation by a boxing match of a wound received in the course of employment, which had practically healed, and would have caused no further trouble had it been given a little more rest, so that blood poisoning and permanent injury to a hand result, is the proximate cause of such injury, and no recovery can be had under a workmen's compensation act providing compensation for injuries received in the course of employment. *Kill v. Industrial Commission* (1915) — Wis. —, ante, 14, 152 N. W. 148.

An additional injury caused by using an injured arm too soon does not arise out of the employment. *Pacific Coast Casualty Co. v. Pillsbury* (1915) Cal. 153 Pac. 24.

<sup>6</sup> *Corral v. William H. Hamlyn & Son* (1915) — R. I. —, 94 Atl. 877.

<sup>7</sup> A carpenter who is injured by attempting to descend from the roof of a building on which he is working, by means of a loose rope, one end of which is held in the hands of a fellow workman, instead of using the ladder provided for such purposes, receives L.R.A.1916A.

defendant claims that the disability has been aggravated and a cure prevented by the neglect of the employee, the employer must show those facts as matters of defense, and in regard to those questions it is proper to resolve all doubt in favor of the employee.<sup>6</sup>

The mere fact that an employee was acting negligently,<sup>7</sup> or in violation of a rule,<sup>8</sup> at the time of the injury, does not prevent the injury from "arising out of and in the course of the employment" if at the time he was actually doing the work for which he was employed. And even if he was doing something for which he was not actually employed, compensation may be recovered if the employee was acting in an honest attempt to further the master's business,<sup>9</sup> particularly if the act in question was necessary in order that his own work

injuries arising out of and in the course of his employment. *Clem v. Chalmers Motor Co.* (1914) 178 Mich. 340, post, 352, 144 N. W. 848, 4 N. C. C. A. 876.

<sup>8</sup> A principal of a school, charged with the duty of holding test exercises for the purpose of selecting a basket ball team, is performing a service growing out of and incidental to his employment even if he held such exercises during the school hours, and the rules of the school board require such exercises to be held at recess. *Milwaukee v. Industrial Commission* (1915) 160 Wis. 238, 151 N. W. 247.

<sup>9</sup> A workman in the bottling house of a brewery, who was charged with the duty of replacing broken electric light bulbs, and who, whenever a bulb was to be replaced, was obliged to go to the foreman to procure a key to unlock the screen cover protecting the bulb, may be found to suffer a personal injury "caused by accident arising out of and in the course of his employment," where he was injured by the explosion of a dynamite cap, supposed by him to be an empty shell, out of which he was attempting to make for himself a key to unlock the screen covers, so as to save the time and energy spent in hunting up the foreman, and carrying the key back and forth whenever a broken bulb was to be replaced. *State ex rel. Duluth Brewing & Malting Co. v. District Ct.* (1915) 129 Minn. 176, 151 N. W. 912. The court said: "The trial court evidently took the view that De Cook in good faith believed he was furthering his master's business and performing an act which he might reasonably be expected to do when he undertook to supply himself with a key. He had never been told that the light bulbs were to be under lock as to him who was charged with the duty of seeing that the broken and defective ones were replaced. He had a variety of matters to attend to, in which he, like servants generally, had to rely on the promptings of his own judgment as to details. Undesirable, indifferent, and of little value, indeed, are the services of an em-

might progress.<sup>10</sup> But if the negligent or disobedient act was performed solely for his own purpose, or if he undertakes to perform work he was not employed to do, merely for his own purpose or for the benefit of third persons, and not to further the master's business, no recovery is allowable.<sup>11</sup>

Injuries received while acting directly under the express orders of the superior arise "out of and in the course of" the employment.<sup>12</sup>

Ordinarily assault by third persons cannot be considered as incidental to

the employment. But where the assault is one which might be reasonably anticipated because of the general character of the work, or of the particular duties imposed upon the workman, injuries resulting therefrom may be found to arise out of and in the course of the employment. As, for instance, where a workman was obliged to work beside an intoxicated fellow workman, who, to the knowledge of the employer, was quarrelsome and dangerous, but who was nevertheless allowed to continue in the employment;<sup>13</sup> and where the workman

ployee who must be expressly directed as to the time, manner, and extent of doing each particular task. Hence, when a servant undertakes in the course of his employment, during the proper hours therefor, and in the proper place, to do something in furtherance of his master's business, and meets with accidental injury therein, the trial court's finding that the accident arose out of and in the course of employment should not be disturbed, unless it is clear to us that the ordinary servant, in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties."

<sup>10</sup> A carpenter is acting within the scope of his employment in attempting to turn on the electric current for the purpose of putting in motion a grindstone on which he intended to sharpen his chisel for service in his particular work. *Wendt v. Industrial Ins. Commission* (1914) 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790.

<sup>11</sup> A finding under the workman's compensation act, that petitioner's decedent was not walking in the usual passageway between the tracks of a railroad company and the defendant coal company's trestle, but was walking on the railroad tracks voluntarily at the time he was struck and killed, and that the accident therefore did not arise out of the decedent's employment, and the petitioner was not entitled to recover compensation, is conclusive on certiorari. *Siemientkowski v. Berwind White Coal Min. Co.* (1914) — N. J. Eq. —, 92 Atl. 909.

There can be no recovery of compensation under the New Jersey act, where the death of an employee occurred while he was using an automobile belonging to the employer, which he had been ordered not to use just before he took it out, since by his own acts he subjected himself to an added peril which was not incidental to his employment. *Reimers v. Proctor Pub. Co.* (1914) 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738. The court cited as authority for this ruling the case of *Barnes v. Nunnery Colliery Co.* [1912] A. C. (Eng.) 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195, in which a boy was injured while riding in a tub in a mine in violation of the rules and express orders of the employers. L.R.A.1916A.

An injury to an engineer employed to run the engine and dynamo in the basement of a printing plant while he is attempting to operate the elevator for the accommodation of employees of the plant on the upper floors of the building, without the knowledge or request of his employer, and at a time when he did not need such service, does not arise out of or in the course of his employment, within the meaning of the workmen's compensation act. *Spooner v. Detroit Saturday Night Co.* (1915) — Mich. —, ante, 17, 153 N. W. 657.

<sup>12</sup> An employee of a city park department is acting within the scope of his employment where he was injured while mowing the lawn between the curb and the sidewalk, at the direction of his superiors, and such work was properly within the jurisdiction of the park commissioners. *Superior v. Industrial Commission* (1915) 160 Wis. 541, 152 N. W. 151, 8 N. C. C. A. 960.

A workman employed by an electric light company to trim trees is not outside the scope of his employment in trimming a tree through which the wires of the company were not to pass, when he was doing the work under the direction of his superior, since it was not part of his business to inquire into the right of the company to trim any particular tree. *Howard's Case* (1914) 218 Mass. 404, 105 N. E. 636, 5 N. C. C. A. 449.

<sup>13</sup> In *McNicol's Case* (1913) 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522, in holding that injuries from an assault at the hands of an intoxicated workman who was known by the employer to be in the habit of drinking to excess, and to be quarrelsome and dangerous while intoxicated, arose "out of the employment," the court, in speaking of the English act, said: "It there had been held that injuries received from lightning on a high and unusually exposed scaffold (*Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. (Eng.) 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429), from the bite of a cat habitually kept in the place of employment, (*Rowland v. Wright* [1909] 1 K. B. (Eng.) 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852), from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath (*Challis v. London & S. W. R. Co.* [1905] 2 K. B.



was charged with the duty of ejecting trespassers;<sup>14</sup> and where a section boss was in charge of a gang of workmen, mostly foreigners.<sup>15</sup>

So, too, it has been held that compensation is recoverable for injuries received while in the course of the employment, where the injury was caused by horseplay on the part of fellow workmen or strangers, if the injured employee himself had taken no part in such horseplay. Thus, an injury to an employee engaged in operating a trip hammer, which injury was received in attempting to remove a tin can which had been

placed under the trip hammer by a bystander for fun, arises out of and in the course of the employment, where the employee took no part in the fun himself.<sup>16</sup> A risk of injury caused by slipping while dodging a playful attack by a fellow workman is a risk incident to the service for which the employer is liable for compensation, where the injured servant did nothing to invite the attack.<sup>17</sup>

But an injury cannot be said to arise "out of and in the course of the employment" where it results solely from the sportive act of a co-worker who was in

(*Eng.*) 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486), and from an attack upon a cashier traveling with a large sum of money (*Nisbet v. Rayne* [1910] 2 K. B. (*Eng.*) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507), all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service (*Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. (*Eng.*) 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648), from fright at the incursion of an insect into the room (*Craske v. Wigan* [1909] 2 K. B. (*Eng.*) 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560), and from a felonious assault of the employer (*Blake v. Head* [1912] 106 L. T. N. S. (*Eng.*) 822, 28 Times L. R. 321, 5 B. W. C. C. 303). . . . A fall from a quay by a sailor while returning from shore leave (*Kitchenham v. The Johannesburg* [1911] 1 K. B. (*Eng.*) 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 91, s. c. [1911] A. C. (*Eng.*) 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311), a sting from a wasp (*Amys v. Barton* [1912] 1 K. B. (*Eng.*) 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117), and a frost bite (*Warner v. Couchman* [1912] A. C. (*Eng.*) 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177), all have been held to be injuries not 'arising out of' the employment. But we find nothing in any of them in conflict with our present conclusion. Nor is there anything at variance with it in *Mitchinson v. Day Bros.* [1913] 1 K. B. (*Eng.*) 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190, where it was held that injuries resulting from an assault by a drunken stranger upon an employee engaged at his work on the highway did not arise out of the employment. That was a quite different situation from the one now before us."

<sup>14</sup> A superintendent of a mill, charged L.R.A.1916A.

with the duty of removing trespassers from the mill, suffers an injury "arising out of and in the course of" his employment, where he is shot by an intruder whom he had ordered from the mill, and who had previously made a disturbance in the mill, and whom the superintendent had been expressly directed to order from the mill. *Re Reithel* (1915) — *Mass.* —, post, 304, 109 N. E. 951. The court said: "It is not usual for people with whom a mill superintendent comes in contact to commit crime. Conduct of that sort is not to be presumed or commonly expected. Danger of being assaulted is not the usual concomitant of work. But when a special duty arises to deal with one who is a trespasser, and annoyer of a woman employee, and a creator of disturbance, then a corresponding special risk of personal violence arises. That duty and that risk then become correlative."

<sup>15</sup> A section foreman in charge of a gang of fifteen or twenty section men, mainly Greeks, may be found to be acting within the scope of his employment in attempting to take a shovel away from one of the gang, who, after he had been properly instructed, continued to do the work in a wrong manner, and who continued to hold the shovel after he had been told to drop it and get his time, and who, upon the foreman's attempting to take the shovel, committed an assault upon him. *Western Indemnity Co. v. Pillsbury* (1915) — *Cal.* —, 151 Pac. 398.

<sup>16</sup> *Knopp v. American Car & Foundry Co.* (1914) 186 Ill. App. 605, 5 N. C. C. A. 798.

<sup>17</sup> *Hulley v. Moosbrugger* (1915) — *N. J.* L. —, 93 Atl. 79. The court, after stating that it was immaterial that the fellow servant, in making the attack upon the deceased, was not acting within the scope of his employment, said: "It was a negligent act of the fellow workman to make a pass at the decedent while passing him on the slant of the concrete floor, and for such negligence the master would not have been liable at common law, not upon the theory that it was not a risk reasonably incident to the employment, but upon the ground that it was a risk which the servant assumed when he entered into his master's employ."

<sup>17a</sup> *De Filippis v. Falkenberg* (1915) —

no way representing the master and which act in no way grew out of or was connected with the employment.<sup>17a</sup>

There is a decided conflict of opinion in the few reported cases upon the question whether injuries or death caused by lightning can be found to arise out of and in the course of the employment. In the earliest case reported, the supreme court of Wisconsin merely held that there was evidence to support the finding of the Industrial Commission, that an employee who was struck by lightning and killed while employed at work on a dam was not injured by a hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunder storm.<sup>18</sup> It is to be noted that the court called attention to the fact that the trial court stated in its finding that if the case were presented to it for a finding upon the evidence, it would not make the finding that had been made by the Commission. In the next case, the Michigan supreme court, reversing the finding of the Commission, held that death by lightning of a section hand on a railroad, while in a barn to which he had resorted for refuge from the storm, did not arise out of and in the course of his employment within the meaning of the Michigan act, although he had gone to the barn at the direction

of the foreman, and it appeared that the men were customarily paid for the time spent while seeking shelter from storm.<sup>19</sup> On the other hand, the Minnesota court has held that a finding that the death of a workman was the result of an accident "arising out of" his employment is sustained by the evidence which shows that the workman was a driver for an ice company, who was required to follow a fixed route in substantial disregard of weather conditions, although permitted to seek shelter in times of necessity, and who, during a storm, left his team and went to a tall tree, either for protection or in performance of his duties, soliciting orders, and was killed by a bolt of lightning which struck the tree under which he was standing.<sup>20</sup> It is clearly impossible to reconcile these cases,—especially the Michigan and Minnesota decisions. The facts in the former case present a much stronger case for the workman than do the facts in the latter, and it is reasonably clear that the Minnesota court would not have interfered with the findings of the Commission.

The burden of furnishing evidence from which the inference can be legitimately drawn that the injury "arose out of and in the course of" the employment rests upon the claimant,<sup>21</sup> and an award

App. Div. —, 155 N. Y. Supp. 761. (Coworker thrust shears through aperture in partition between toilet rooms injuring claimant's eye).

<sup>18</sup> *Hoenig v. Industrial Commission* (1915) 159 Wis. 646, post, 339, 150 N. W. 996, 8 N. C. C. A. 192.

<sup>19</sup> *Klawinski v. Lake Shore & M. S. R. Co.* (1915) — Mich. —, post, 342, 152 N. W. 213.

<sup>20</sup> *State ex rel. People's Coal & Ice Co. v. District Ct.* (1915) — Minn. —, post, 344, 153 N. W. 119.

<sup>21</sup> *Re Savage* (1915) — Mass. —, 110 N. E. 283; *King's Case* (1915) 220 Mass. 290, 107 N. E. 959; *McCoy v. Michigan Screw Co.* (1914) 180 Mich. 454, post, 323, 147 N. W. 572, 5 N. C. C. A. 455; *Bryant v. Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

The burden of proving the essential facts necessary to establish a case rests upon the party petitioning for relief under the workmen's compensation act as much as it does upon the plaintiff in any proceeding at law. *Corral v. William H. Hamlyn & Son* (1915) — R. I. —, 94 Atl. 877.

"It is well settled that the burden rests upon one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the injured party was employed." *Hills* L.R.A.1916A.

*v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

Claimants under the workmen's compensation act have the burden of establishing by the preponderance of evidence that the injury arose out of and in the course of the employment. *Sponatski's Case* (1915) 220 Mass. 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025.

<sup>22</sup> An award of compensation must be set aside as having been made on mere conjecture, where the Commission found that something fell into the eye of the employee, a plumber, while he was lying on his back to fix the hot water cock of a wash basin, which caused acute pain, and impelled the rubbing of the eye, and that gonorrhoeal infection developed, resulting in the loss of the eye, and further found that the substance which fell in the eye may have been infected, or "with the eye inflamed it might have become infected by rubbing it with an infected cloth or washing it with infected water or in other ways," although it was found upon sufficient evidence that the claimant had no gonorrhoeal infection except that which developed in his eye. *Voelz v. Industrial Commission* (1915) — Wis. —, 152 N. W. 830.

An award of compensation for injuries from lead poisoning to an employee in a printing shop, engaged in handling the type as it is cast from molten lead by a linotype machine, must be reversed, where there is



which is based on mere surmise or conjecture will be set aside.<sup>22</sup> Although the claimant must show that the injury arose out of and in the course of the employment, nevertheless these facts may be shown by circumstantial evi-

dence.<sup>23</sup> In the note below will be found a number of cases in which it was held that the evidence developed was sufficient to show that the injury in question arose out of and in the course of the employee's employment.<sup>24</sup>

nothing to show that lead fumes or lead dust or any dangerous compound of lead is given off in a printing office, or in such handling of type as that engaged in by the employee to such an extent or in such form as is likely to be taken into the human system and to cause plumbism or lead poisoning. *Re Doherty* (1915) — *Mass.* —, 109 N. E. 887.

Where a workman employed in building a bridge over a river near its outlet in a bay was last seen alive at his home some miles from the place of work, and two hours before he was to return to his work, and his body was afterwards found in the bay, and there was no evidence as to how he met his death, it may properly be inferred that he came to his death by accident, but not that the accident arose out of his employment. *Steers v. Tannewald* (1914) 85 N. J. L. 449, 89 Atl. 207, 4 N. C. C. A. 676.

The finding that the dependent is not entitled to compensation is justified where it appeared that the death of the workman occurred by reason of his unexplained absence from the car which he was engaged in unloading, and his unexplained presence on the track where he was struck. *Re Savage* (1915) — *Mass.* —, 110 N. E. 283.

To justify recovery of compensation, it is not enough to show a state of facts which is equally consistent with no right of compensation as it is with such right. (*Mass.*) *Ibid.*

<sup>23</sup> *Poccardi v. Public Service Commission* (1915) — *W. Va.* —, post, 299, 84 S. E. 242.

<sup>24</sup> Where the physical incapacity of a lead grinder for work has been found by the Industrial Accident Board to have been caused by the gradual absorption of poison into his system subsequent to the time when the act went into force, there is no reasonable conclusion other than that such injury arose out of and in the course of his employment. *Johnson's Case* (1914) 217 *Mass.* 388, 104 N. E. 735, 4 N. C. C. A. 843.

A finding by the Industrial Accident Board, that the death of an employee was caused by injury arising "out of and in the course of his employment," will not be set aside merely because hearsay evidence was erroneously admitted, where, three days before the employee's death, the employer made a report of the accident in which the "cause and manner of accident" was stated as being that the employee "was throwing wood in furnace and a nail run in left hand, inflicting a deep gash," and after his death the employer made a second report of the accident in which he stated that the employee was injured by scratching his hand on a nail. *Reck v. Whittlesberger* (1914) 181 *Mich.* 463, 148 N. W. 247. The court said: "We think that such reports from the employer, where all sources of informa-

tion are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and at least as a prima facie evidence that such accident and injury occurred as reported."

Where, under the rules of the employer, it was the duty of the foreman of the factory to notify immediately his superior of any injury, and it appeared that an injured workman, after receiving an injury, reported to the foreman in charge of the shop, and this foreman put a memorandum in writing, and thereupon notified his superior of the fact of the injury, and the employer notified its indemnity company, these acts are at least prima facie evidence that an accident and injury occurred, and that the injury arose in the course of the deceased's employment. *Fitzgerald v. Lozier Motor Co.* (1915) — *Mich.* —, 154 N. W. 67.

Where an employee, who was engaged in cleaning rubbish out of a flume, was last seen standing on a walk very near the river, with his back toward the stream, trying to pull some bushes out of the flume with an ordinary garden rake, and a few minutes later was missing and could not be found, and twelve days later his body was recovered from the river below the mill, a broken rake was found in the flume, and a freshly broken rake handle was found in the river, it may be found that the employee suffered death by accident "arising out of and in the course of his employment." *Boody v. K. & C. Mfg. Co.* (1914) 77 N. H. 208, ante, 10, 90 Atl. 859, *Ann. Cas.* 1914D, 1280.

When the evidence permitted the common pleas judge to find as a fact that the decedent, while at work for his employer as a journeyman carpenter, on a building in course of erection, was killed by the falling of a bar of metal from one of the upper stories, which was caused to fall by a workman of an independent contractor, who had work on the same building, the judge is justified in concluding that the decedent's injury arose "out of and in the course of his employment." *Bryant v. Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Where a railroad employee was found after a train had gone out, lying some 3 or 4 feet from the rails, with his feet toward the track, having an injury in his head, and died shortly thereafter from a broken neck, an inference arises that his injury was caused by accident arising out of and in the course of his employment. *Muzik v. Erie R. Co.* (1914) 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732, affirmed in 86 N. J. L. 695, 92 Atl. 1087.

The supreme court will not interfere with the findings of the justice of the superior

**XXXIV. "Serious or wilful misconduct" of employee.**

As to the effect of serious and wilful misconduct of workman under the English act, see ante, 75.

By the express terms of most of the American statutes no compensation is recoverable for injuries caused by the "serious and wilful misconduct" of the employee. This phrase means something

more than mere negligence,<sup>25</sup> or even gross negligence.<sup>26</sup> It involves conduct of a quasi criminal nature,—the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.<sup>27</sup>

"Serious and wilful misconduct" does not include every violation of a rule or

court that the death of a workman arose out of and in the course of his employment where there was evidence that he was employed by an ice company to watch its pond and to prevent all persons from cutting holes and fishing through the ice, and was not directed as to how he should perform that duty or at what place on the pond or its shores he should station himself, and that during the time in which he was there on duty, and while he was alone in the center of the pond, the ice on which he was walking broke, and he was precipitated into the water and drowned. *Jillson v. Ross* (1915) — R. I. —, 94 Atl. 717.

The death of an employee who, prior to his injury, was shown to be a seemingly strong and healthy man, and who was burned on his hands and face by an explosion of gas, and subsequently complained of pains in his throat and chest, and was in a run-down condition, and died about four months after his injury of military tuberculosis, may be found to have been proximately caused by the gas explosion, where there was expert testimony to the effect that the inhalation of the gas fumes would furnish an opportunity, if the infection of the disease existed in a latent condition at the time, for the latent condition to be kindled into an active condition; and that if the infection was not existent, the inhalation of gas would bring about the destruction of air cells in the lungs, and would lower his vitality, and make the person more susceptible to such infection; and that the usual time for the course of military tuberculosis was from four to six weeks, but that it might continue for a period of three or four months. *Heileman Brewing Co. v. Schultz* (1915) — Wis. —, 152 N. W. 446.

Where there is evidence to support the inference that the deceased workman, who was found on a Sunday night fatally injured, on the basement floor underneath a hole which had been cut in the first floor of the building, usually went to the part of the building where he fell upon Sunday evening, and that at times on Sunday evening he performed services in any part of the building, the award of the Industrial Commission, based upon the conclusion of fact that the deceased accidentally sustained a personal injury which caused his death, and that it was incidental to his employment, will not be disturbed. *Heileman Brewing Co. v. Shaw* (1915) — Wis. —, 154 N. W. 631.  
L.R.A.1916A.

Where the deceased workman was employed as night janitor and watchman by a bank, his duties being, among other things, to clean ink wells and cuspidors, and make rounds of the building, and it appeared that he was at the bank on duty on the night in question, the testimony of another employee that the deceased appeared before him sucking his thumb, and made the statement that he had pricked it, is competent evidence as part of the *res gestæ* where it also appeared from the evidence that it was the deceased's custom to suck any part injured immediately upon receiving any injury, and that he was in perfect condition when he entered the bank that night. *First Nat. Bank v. Industrial Commission* (1915) — Wis. —, 154 N. W. 847.

<sup>25</sup> *Great Western Power Co. v. Pillsbury* (1915) — Cal. —, 149 Pac. 35.

The act of a carpenter, in attempting to descend from the roof of a building on which he is working by means of a loose rope, one end of which is held in the hands of a fellow workman, instead of using a ladder provided for such purposes, is not intentional and wilful misconduct. *Clem v. Chalmers Motor Co.* (1914) 178 Mich. 340, post, 352, 144 N. W. 848, 4 N. C. C. A. 876.

<sup>26</sup> "Serious and wilful misconduct" is a very different thing from negligence, or even from gross negligence; it resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee. *Burns's Case* (1914) 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *Nickerson's Case* (1914) 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645.

An employee engaged in checking automobiles as they were placed on a car, who was injured while attempting to cross through a standing train without stopping to see where the trainmen were, and without knowing but what they were signaling the train to back up or go ahead, is not, as a matter of law, guilty of intentional and wilful misconduct within the meaning of the Michigan act. *Gignac v. Studebaker Corp.* (1915) — Mich. —, 152 N. W. 1037. The court said: "While it is quite clear that the claimant's injury was brought about by his own gross negligence, we are of opinion that it cannot be said, as a matter of law, that he was guilty of such intentional and wilful misconduct as would defeat his recovery."

<sup>27</sup> *Burns's Case* (Mass.) supra.



of express orders.<sup>28</sup> But it has been said that "it cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule with knowledge of its existence, and of the dangers accompanying its violation, he is guilty of wilful misconduct."<sup>29</sup>

Suicide has been spoken of as wilful misconduct.<sup>30</sup>

Where an employee adopts the customary way of operating a machine, he cannot be held to be guilty of contributory negligence as a matter of law, which defense was left open to the employer under the Wisconsin act of 1911.<sup>31</sup> The refusal of an injured workman, a foreigner, unable to speak or understand the English language, and suffering great pain, to submit to a serious operation, until fifteen or sixteen hours after it was first found necessary, does not amount to the intentional and wilful misconduct which will defeat a right to compensation.<sup>32</sup> An employee is not negligent, as a matter of law, in going onto a wet and slippery walk to clear the debris from the rack protecting the flume leading water from the dam to the mill in which he is em-

ployed, where the work was necessary and all fair-minded men would not agree that the risk of injury was so apparent that the ordinary man would not have encountered it.<sup>33</sup>

The New Jersey statute makes no exemption because of the wilful negligence on the part of the workman.<sup>34</sup>

The existence of "serious and wilful misconduct" under any particular circumstances is usually a question of fact.<sup>35</sup> But it has been held that inasmuch as no compensation can be awarded to a workman whose injuries were caused by his own wilful misconduct, a question whether the accident was caused by the "wilful misconduct of the employee" is one that goes to the jurisdiction of the Industrial Board, and is therefore open to inquiry by the court on certiorari.<sup>36</sup>

#### XXXV. Notice of injury; "actual knowledge" of employer.

As to notice of injury under the English act, see ante, 83.

Some of the statutes require that notice of the injury shall be given to the employer after the accident, or that the employer shall, in some way, have actual knowledge of the injury. These provisions have not received much attention in the court.

<sup>28</sup> Great Western Power Co. v. Pillsbury (1915) — Cal. —, 149 Pac. 35.

The act of a painter in working near machinery while it was in motion, after he had been told not to, may be found not to be serious and wilful misconduct where he was justified in believing that the machinery would stop at any moment. Nickerson's Case (1914) 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645.

<sup>29</sup> In Great Western Power Co. v. Pillsbury (1915) — Cal. —, 149 Pac. 35, it was held that the failure of an experienced lineman, in working about live wires, to use rubber gloves, as the rules of the employer required, and as he had been recently directed by his foreman to do, which gloves were furnished by the employer, and were at hand, constitutes wilful misconduct justifying an annulment by the court of an award by the Industrial Commission of compensation to the lineman's dependents. Angellotti, Ch. J., dissented from the judgment annulling the award upon the ground that he did not think that the court should hold that the evidence compelled the conclusion as a matter of law that the death of the deceased was caused by his own "wilful misconduct."

<sup>30</sup> Milwaukee Western Fuel Co. v. Industrial Commission (1915) 159 Wis. 635, 150 N. W. 998.

<sup>31</sup> Besnys v. Herman Zohrlaut Leather Co. (1914) 157 Wis. 203, 147 N. W. 37, 5 N. C. C. A. 282.

L.R.A.1916A.

<sup>32</sup> Jendrus v. Detroit Steel Products Co. (1913) 178 Mich. 265, post, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864.

<sup>33</sup> Boody v. K. & C. Mfg. Co. (1914) 77 N. H. 208, ante, 10, 90 Atl. 859, Ann. Cas. 1914D, 1280.

<sup>34</sup> West Jersey Trust Co. v. Philadelphia & R. R. Co. (1915) — N. J. L. —, 95 Atl. 753.

Under § 2 of the New Jersey act of 1911, the employer is exempted from liability for compensation only when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of the injury; there is no exemption because of wilful negligence on the part of the workman. Taylor v. Seabrook (1915) — N. J. L. —, 94 Atl. 399.

<sup>35</sup> Nickerson's Case (1914) 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645.

A finding by the Commission, under the workmen's compensation act, that although an injury to an employee was due to his intoxication, it was not caused by his wilful misconduct, so as to relieve the employer from liability under the statute, cannot be disturbed by the court where it has no authority to examine the evidence. Nekoosa-Edwards Paper Co. v. Industrial Commission (1913) 154 Wis. 105, post, 348, 141 N. W. 1013, Ann. Cas. 1915B, 995.

<sup>36</sup> Great Western Power Co. v. Pillsbury (1915) — Cal. —, 149 Pac. 35.

Where the employer has actual knowledge of the happening of the accident, and of the resulting injury, the giving of notice thereof is not necessary;<sup>37</sup> and the employer may by his conduct waive the failure of the plaintiff to make a claim within the time specified in the statute, or at any time prior to the time when the notice was given.<sup>38</sup>

The actual knowledge on the part of the employer of the occurrence of the injury, required by § 15 of the workmen's compensation act of 1911, means, in the case of a corporation, knowledge of a proper corporate agent.<sup>39</sup>

The knowledge of a mayor of a city is the knowledge of the city.<sup>39a</sup>

The court has jurisdiction of all proceedings arising under the act, and the making of a demand upon the employer for compensation is not a condition precedent to the power of the court to entertain such proceedings.<sup>40</sup>

The provisions of the act of 1913, requiring all claims of compensation to be filed within one year after the accident, does not apply to a claim for compensation arising under the act of 1911.<sup>41</sup>

#### XXXVI. Who are "employers."

For English decisions defining this term, see ante, 113.

A receiver who is conducting the business of the original employer during insolvency is by the terms of the statute

bound to make the payments which the employee or his representative was entitled to receive from the original employer, during the time he conducts the business.<sup>42</sup>

Municipalities may be employers within the meaning of the Illinois act.<sup>43a</sup>

The Michigan statute is compulsory as to the state, each county, city, township, incorporated village, and school district; but the state boards do not come within this provision.<sup>43</sup>

Where the owner of a horse and cart loaned them, together with a driver, to a city for use in cleaning sweepings from the street, but retained control of the horse so far as feeding, watering, and care of it was concerned, the driver, while taking the horse to water during the noon hour, is in the employment of the owner of the horse, and not of the city.<sup>44</sup>

In the former part of this annotation, dealing with the English decisions, it was stated that the question frequently arising in common-law cases, namely, which of two persons is the master of a third who is admittedly a servant of one of them, was to be decided by common-law rules, and not by rules peculiar to the compensation act. This statement, however, does not apply to all of the American statutes.

Thus under the New Jersey act, the employer who is liable for compensation is the person who makes the contract

<sup>37</sup> State ex rel. Duluth Diamond Drilling Co. v. District Ct. (1915) 129 Minn. 423, 152 N. W. 838.

<sup>38</sup> In a case in which the defendant employer and its officers knew the circumstances and extent of the injury, and the plaintiff was treated by defendant's physician, and there were admissions of liability and offers to confess judgment, as well as motions that judgment be awarded in favor of the plaintiff and against defendant for a limited sum, provided it was awarded in the form of periodical payments, the defendant will be deemed to have waived the failure of the plaintiff to make the claim within a specified time, or at a time earlier than it was made. Roberts v. Charles Wolff Packing Co. (1915) 95 Kan. 723, 149 Pac. 413.

<sup>39</sup> Actual knowledge on the part of the director of streets and public improvements of a city of an injury to an employee on street work is sufficient to satisfy the requirements of § 15 of New Jersey act of 1911, which provides that the employer shall have actual knowledge of the occurrence of the injury; and where the director of streets and public improvements of a city was notified by one of his drivers of an injury to an employee engaged in street work, and the director went to see how badly the employee was injured, and took him his L.R.A.1916A.

wages due, the trial court is justified in finding that the municipality had actual knowledge of the occurrence of the injury. Allen v. Millville (1915) — N. J. L. —, 95 Atl. 130.

<sup>39a</sup> State ex rel. Northfield v. District Ct. (1915) — Minn. —, 155 N. W. 103.

<sup>40</sup> State ex rel. Duluth Diamond Drilling Co. v. District Ct. (1915) 129 Minn. 423, 152 N. W. 838.

<sup>41</sup> Baur v. Court of Common Pleas (1915) — N. J. L. —, 95 Atl. 627.

<sup>42</sup> Wood v. Camden Iron Works (1915) 221 Fed. 1010.

<sup>43</sup> The state board of agriculture is not brought within the act by virtue of part 1, § 5, subd. 1, which provides that the state is an employer within the meaning of the Michigan act; consequently an employee of the agricultural college, who was employed by such state board of agriculture, is not within the act, where such state board has not elected to come within the provisions thereof. Agler v. Michigan Agri. College (1914) 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897.

<sup>43a</sup> Brown v. Decatur (1914) 188 Ill. App. 147.

<sup>44</sup> Pigeon's Case (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516.



with the servant whereby the latter engages to work for the former, and he on his part engages to pay the servant for such work.<sup>45</sup>

### XXXVII. Who are "employees."

For English decisions defining this term, see ante, 115.

#### a. In general.

There can be no recovery of compensation in the absence of a contract of employment between the injured person and the alleged employer.<sup>46</sup> The relation of employer and employee did not exist at the time of the injury where, when the plaintiff went to the city office of the defendant's logging railroad company, and was directed by the person in charge to go to a certain place near its logging camp, and when he had arrived there he went to the defendant's logging train, and was there directed by the engineer to place his baggage upon the pilot of the engine and to get aboard, and rode upon the pilot to the logging camp, and within a very brief period of time after his arrival the accident occurred, and he had not reported it to the foreman, or to anyone in charge, was not upon the defendant's pay roll, and had never done any work or received any compensation from the defendant.<sup>47</sup>

Misrepresentation made by an employee at the time of entering the employment, for the purpose of securing the employment, will not necessarily prevent his recovering compensation for injuries received while in the employment, particularly where there is no

causal connection between the misrepresentation and the contract, or where such false representation in no way contributed to the injury. Thus, a misrepresentation as to the name and age of the employee, made at the time of entering the employment, does not, in the absence of any proof that the employer was induced to enter into the contract upon such misrepresentation, constitute such a fraud that it will operate to relieve him from the statutory obligation to make compensation in a case arising under the statute,—especially where it does not appear that there was any causal connection between the misrepresentation and the contract.<sup>48</sup> And a conductor upon an electric street surface car was an employee of the company so as to be within the protection of the New York statute, although he had secured employment by making false affidavits as to whether he was married or single, and as to whether he had ever been employed by another railroad company, where such false representations in no way related to or contributed to the cause of his death.<sup>49</sup>

Ordinarily there can be no recovery of compensation for injuries to a minor where he is employed in an occupation prohibited by law.<sup>50</sup> But under the Wisconsin statute, "minors who are legally permitted to work under the laws of the state" are embraced within the act, and cannot maintain actions for damages, although at the time of the injury they are doing work not permitted by law.<sup>51</sup>

Farm laborers are expressly excluded from the provisions of the Massachusetts act.<sup>52</sup>

<sup>45</sup> A person who makes a contract with contracting teamsters for the supply of a team consisting of horses, wagon, and a driver, for which as a team he pays the teamsters, is not the "employer" of the driver within the meaning of the New Jersey act, where he had no direct dealings with the driver, and had nothing to say on the question of how much wages the driver should be paid. *Rongo v. R. Waddington & Sons* (1915) — *N. J. L.* —, 94 *Atl.* 408.

<sup>46</sup> No contract of employment can be inferred between a father and his son thirteen years of age, where when the boy went to work, there was nothing at all said about the wages, and the boy was injured a short time after he began to work, and before any wages had in fact been paid to him. *Hillestad v. Industrial Ins. Commission* (1914) 80 *Wash.* 426, 141 *Pac.* 913, 6 *N. C. C. A.* 763.

<sup>47</sup> *Suszniak v. Alger Logging Co.* (1915) — *Or.* —, 147 *Pac.* 922. In this case the appellate court held that the defendants suffered no substantial wrong by reason of the trial court's action in striking out the L.R.A.1916A.

defendants' first affirmative defense relating to the compensation act, since under the evidence such defense must necessarily have failed.

<sup>48</sup> *Havey v. Erie R. Co.* (1915) — *N. J. L.* —, 95 *Atl.* 124.

<sup>49</sup> *Kenny v. Union R. Co.* (1915) 166 *App. Div.* 497, 152 *N. Y. Supp.* 117, 8 *N. C. C. A.* 986.

<sup>50</sup> Floating bolts to a mill is a department or a part of the manufacturing of shingles; and there can be no compensation recovered for injury to a boy employed at that work in violation of the statute forbidding the employment of minors under a certain age, in any factory, mill, workshop, or store. *Hillestad v. Industrial Ins. Commission* (1914) 80 *Wash.* 426, 141 *Pac.* 913, 6 *N. C. C. A.* 763.

<sup>51</sup> *Foth v. Macomber & W. Rope Co.* (1915) — *Wis.* —, 154 *N. W.* 369.

<sup>52</sup> A man employed on a farm who does all kinds of farm work is a "farm laborer" within the meaning of the statute, and he is not within the protection of the act, although the farmer who employs him may carry on other business. *Keaney's Case*

A policeman who is an appointed officer and is required to take an official oath of office is not an "employee" within the meaning of the Michigan act, but is an "official" of a city, and is not within the protection of the act.<sup>53</sup>

The Wisconsin statute applies to all employees of a railroad, and not merely such employees as are engaged in shops or offices.<sup>54</sup> The wording of the statute is somewhat ambiguous, and there has been a general belief, especially on the part of laymen, that the act was applicable only to such employees of a railroad company as worked in shops or offices.

#### *b. Independent contractors.*

Employees occupying the position of independent contractors are not embraced within the provisions of the compensation acts generally.<sup>55</sup> Whether or not a workman is an employee or an independent contractor will be determined by the rule which would be applicable had the case arisen in an ordinary action at law.<sup>56</sup>

An employee of an independent contractor intrusted with the entire work of furnishing the ways, works, machin-

ery, or plant for doing the work, without the control, co-operation, assistance, or interference of the owners, is not entitled to compensation for injuries, from the owner.<sup>57</sup> Employees of independent contractors have, however, been held to be under the protection of the Massachusetts act.<sup>58</sup>

#### *c. "Casual" employees.*

For English cases defining this term, see ante, 120.

The English statute provides that the word "workman," within the meaning of the statute, does not include persons "whose employment is of a casual nature, and who are employed otherwise than for the purposes of the employer's trade or business." Provisions of similar import are to be found in most of the American statutes, but the language used in some of the statutes is susceptible of a different construction. The Massachusetts statute does not apply where the employee's employment "is but casual, or is not in the usual course" of the trade or occupation of the employer. The distinction between the two acts has been noted by the Massachusetts supreme judicial court.<sup>59</sup> The court held,

(1914) 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556.

<sup>53</sup> Blynn v. Pontiac (1915) — Mich. —, 151 N. W. 681, 8 N. C. C. A. 793.

<sup>54</sup> Minneapolis, St. P. & S. Ste. M. R. Co. v. Industrial Commission (1913) 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655, 3 N. C. C. A. 707.

<sup>55</sup> Independent contractors are not within the provisions of the New York act. *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426; *Rheinwald v. Builders' Brick & Supply Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598.

<sup>56</sup> An employee of a timber company may be found to be a workman within the meaning of the Minnesota statute although he was paid at a specified price per piece, and could work as much or as little as he wished, could lay off whenever and as long as he chose, could work as many or as few hours a day as he saw fit, could proceed in his own way so far as his method of working was concerned, and could quit finally whenever he elected to do so, and was assigned a specific tract of land upon which to work, where the company required him to cut the timber clean as he went, and reserved the right to control and supervise his work at least to the extent necessary to prevent waste and loss, and inspected his work from time to time, and occasionally directed him to remedy the defects therein, and had the right to discharge him at any time. *State ex rel. Virginia & R. Lake Co. v. District Ct.* (1914) 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

<sup>57</sup> *Kennedy v. David Kaufman & Sons Co.* L.R.A.1916A.

(1914) — N. J. L. —, 91 Atl. 99. The court said: "What the plaintiff claims is that in all cases where the entire work is left to an independent contractor, the employer is liable for defects in ways, works, machinery, or plant belonging to or furnished by such independent contractor. This is not the proper construction of the statute, but, on the contrary, the employer is only liable where he furnishes the ways, works, machinery, or plant in aid of part execution of his work, and does not make him liable where the entire work is left to an independent contractor who furnishes the ways, works, machinery, or plant, over whose negligent conduct in not remedying defects the employer has no control."

<sup>58</sup> An employee of an independent contractor is entitled to compensation from the insurer of the principal employer for injuries received under circumstances which would have made the insurer liable had the employee been in the immediate employment of the principal employer, although the independent contractor carried no insurance. *Sundine's Case* (1914) 218 Mass. 1, post, 318, 105 N. E. 433, 5 N. C. C. A. 616.

<sup>59</sup> *Gaynor's Case* (1914) 217 Mass. 86, post, 363, 104 N. E. 339, 4 N. C. C. A. 502, the court said: "Manifestly its effect is to narrow the scope of our act as compared with the English act. No one whose employment is 'casual' can recover here, while there one whose employment is 'of a casual nature' comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinc-



however, that whether tested by the English act or by the Massachusetts act, a waiter employed by a caterer to serve at a particular banquet for a specified price and transportation, with freedom to go where he will when the service is finished, is not within the protection of the act.<sup>60</sup>

An employee hired for no fixed duration of time and for no particular job, but only hired as the employer might wish work to be done, is not within the protection of the Massachusetts statute.<sup>61</sup> An employment is not "casual" within the meaning of the New Jersey act where one is employed to do a particular part of a service recurring somewhat regularly, with a fair expectation of a continuance for a reasonable period.<sup>62</sup> Nor is the employment of a workman for an indefinite period of time, at so much per day;<sup>63</sup> and employment for an in-

tion as to the character of the employment may be founded upon the difference between the modifying word 'casual' used in our act, and the words 'of a casual nature' in the English act. The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test." The court went on to say that the word "or," as used in the portion of the statute quoted above, is used in a disjunctive sense, and is not used in the sense of "to wit," that is, identity with, or explanation of, that which goes before.

<sup>60</sup> *Gaynor's Case (Mass.) supra*. The court said: "Even the decisions under the English act are plain to the effect that employment such as that which existed in the case at bar there [in England] would be treated not only as casual in the respect of the contract for hiring, but also casual in its nature."

<sup>61</sup> The employment by a coal dealer of a teamster, with his horses and wagon, to deliver coal, is casual where the evidence showed that at one period he had been employed for five days, and about a year afterwards was employed for a period of eight days which were not consecutive, and the teamster was hired for no fixed duration of time and for no specified job, but when the coal dealer wanted him he would say to him simply that he wanted him to come up and help him. *Cheevers's Case (1914)* 219 *Mass.* 244, 106 *N. E.* 861. In speaking of the limitation as to casual employment, the court said: "The scheme created by the workmen's compensation act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employees. It may have been thought impracticable to work out a scheme of insurance if persons who were only occasionally employed are to be included among those

L.R.A.1916A

definite time to do piece work may be found not to be casual.<sup>64</sup>

The court cannot assume that an employment was only casual where the Industrial Accident Board has found that the employment was not casual, and only excerpts of the evidence are contained in the record, although such excerpts tend to show that the employment was casual.<sup>65</sup>

That the employment of a workman is casual is immaterial if he is employed in the usual course of the trade, business, profession, or occupation of his employer.<sup>65a</sup>

### XXXVIII. Who are "dependents."

For English decisions defining this term, see ante, 121.

Dependency, within the provisions of the statute, does not mean absolute dependency for the necessities of life;<sup>66</sup> it

insured. This limitation was repealed by Stat. 1914, chap. 708, § 13."

<sup>62</sup> The work of a longshoreman who was frequently called upon by the defendants to serve them in loading or unloading their ship was not casual. *Sabella v. Brasileiro (1914)* 86 *N. J. L.* 505, 91 *Atl.* 1032, 6 *N. C. C. A.* 958, affirmed in — *N. J.* —, 94 *Atl.* 1103.

<sup>63</sup> A workman employed for an indefinite period at \$5 per day, to work on a contract for the erection of a structural steel building, is not in a casual employment. *Scott v. Payne Bros. (1913)* 85 *N. J. L.* 446, 89 *Atl.* 927, 4 *N. C. C. A.* 682.

<sup>64</sup> The trial judge may find that the employment was not casual where the petitioner testified that the employer told him to "come Monday morning, I will give you some work to shave the skins;" that the price was to be so much a dozen, and if the petitioner did better work, more. *Schaeffer v. De Grottola (1913)* 85 *N. J. L.* 444, 89 *Atl.* 921, 4 *N. C. C. A.* 582.

<sup>65</sup> *King's Case (1915)* 220 *Mass.* 290, 107 *N. E.* 959.

<sup>65a</sup> Part of the business of a municipal corporation is the improvement and repair of its public streets, and a laborer engaged in improving and repairing the streets of a city is within the protection of the Minnesota act, although his employment is but casual. *State ex rel. Northfield v. District Court (1915)* — *Minn.* —, 155 *N. W.* 103.

<sup>66</sup> It is not essential to the right of a dependent who seeks to recover compensation under the New Jersey act, that he should be actually or entirely dependent upon the earnings of the deceased for the necessities of life, but it is sufficient if it appears that he is a dependent in fact. *Havey v. Erie R. Co. (1915)* — *N. J. L.* —, 95 *Atl.* 124.

Evidence that a deceased workman contributed to the support of his mother, and that she, while not immediately dependent

is sufficient that contributions of the workman are looked to for support in the maintenance of the dependent's accustomed mode of living.<sup>67</sup>

The mere fact that the claimant has some property of his own does not necessarily prevent him from being dependent upon the earnings of the deceased workman.<sup>68</sup> And the fact that he is in part supported by other members of the family is not conclusive as a matter of law against his claim.<sup>69</sup> A sister may be found to be a dependent upon her deceased brother, where he and another brother made their home with her, spending their spare time from Saturday until Monday at her house, and each gave her \$5 a week, which was

materially more than the mere value of the board and lodging for the thirty-six hours and the care of their extra clothing for the rest of the week.<sup>70</sup> So, a mother may be found to be an actual dependent upon the wages of her deceased son, although her husband is living and supports her in part.<sup>71</sup>

That a daughter is able to support herself does not, as a matter of law, prevent her from recovering compensation for the death of her father, where as a matter of fact she had been wholly supported by him.<sup>72</sup> To constitute "total dependency" within the meaning of the Minnesota act, it is not necessary that the dependent be supported wholly out of the wages of the employee's employ-

for sustenance upon such contributions, was, because of advancing years, condition of mind, lack of regular employment and of property, liable to become dependent, is sufficient to sustain a finding that she was a dependent upon the son's earnings within the meaning of the Connecticut act. *Hotel Bond Co's Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

<sup>67</sup> *Dazy v. Apponaug Co.* (1914) 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594.

A dependent, under the Connecticut act, is not necessarily one to whom the contributions of the injured or deceased workman are necessary to his or her support of life; the test is whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent. *Hotel Bond Co's Appeal* (Conn.) supra.

<sup>68</sup> The fact that a daughter who for three years before her father's death had had no income except money allowed her by her father, and wages for two weeks, which were so small that they may be disregarded, and who was too ill to work, had at her father's death saved \$100 from the money given her by him, does not prevent a finding that she was wholly dependent upon her father at the time of his death. *Re Carter* (1915) 221 Mass. 105, 108 N. E. 911.

The parents of a deceased workman may be found to be "wholly dependent" upon him for support within the meaning of the Minnesota act, where both parents were helpless invalids, although they owned their own home, and a married daughter lived with them, doing all the housework, and caring for her invalid father and mother gratuitously. *State ex rel. Splady v. District Ct.* (1915) 128 Minn. 338, 151 N. W. 123. The court said: "It may certainly be argued with some force that one who owns his home, or for whom others perform friendly services, is not, technically speaking, 'wholly dependent' upon the cash received from the wages of the worker of the family. Nor is one who receives help from a charitable organization, or from neighbors. But we cannot suppose that the legislature L.R.A.1916A.

intended that such a person should be considered only a 'partial dependent.'"

<sup>69</sup> A mother and sister of a deceased workman may be found to be wholly dependent upon him within the provisions of the statute, where the proof was that they were residents of Italy, and were unable, by reason of failing eyesight, to follow their usual occupation, and were forced to rely wholly upon him for means of subsistence, although another sister earned six or seven cents a day, and an aunt of the deceased occasionally made gratuitous remittances to the mother, where it was shown that the remittances were mere gratuities, and that the pittance earned by the sister was hardly sufficient for her own maintenance and that no part was paid to the dependents, who never relied either upon the sister or the aunt for aid. *Caliendo's Case* (1914) 219 Mass. 498, 107 N. E. 370.

A sister of a deceased workman may be found to be a dependent upon his earnings where the greater portion of his earnings went into a family fund contributed to by other members of the family and the sister was a delicate school girl of 15 years of age who earned nothing and had no independent means of support and the father was in poor health and his earnings which were also turned into the family fund were not sufficient to support the dependent members of the family. *Walz v. Holbrook T. & R. Corp.* (1915) — App. Div. —, 155 N. Y. Supp. 703.

<sup>70</sup> *Hammill v. Pennsylvania R. Co.* (1915) — N. J. L. —, 94 Atl. 313.

<sup>71</sup> The trial court may find that a mother was an actual dependent upon the earnings of her deceased son, although her husband was living, where the deceased contributed \$5 per week to the family fund, the husband earned but \$11 per week, and there were seven other children, all too young to earn money, and the family had no other property or income. *Krauss v. George H. Fritz & Son* (1915) — N. J. —, 93 Atl. 578.

<sup>72</sup> That but for a daughter's sense of duty because she thought that her father



ment.<sup>73</sup> And it is not necessary that the contributions of the workman shall have been made at regular intervals or in stated amounts.<sup>74</sup>

To come within the phrase "actual dependent," as used in the New Jersey statute, it is not necessary that the claimants of a deceased workman should have been entirely dependent upon the deceased; if they were partially dependent, they are dependent in fact.<sup>75</sup>

A father who is able to save money out of his own wages, and makes use of the net profits from his son's wages, after providing the latter with clothes, board, spending money, merely to in-

needed her care, she might have continued to earn enough for her own support and to be independent of him, cannot be decisive, as a matter of law, against her claim, where all of her support came from him. *Herrick's Case* (1914) 217 *Mass.* 111, 104 N. E. 432, 4 N. C. C. A. 554.

<sup>73</sup> A widowed mother without means, who is supported by her son, partly by the wages of his employment, and partly by the yield of his land, is wholly dependent upon her son for support within the meaning of the Minnesota act. *State ex rel. Crookston Lumber Co. v. District Ct.* (1915) — *Minn.* —, 154 N. W. 509.

<sup>74</sup> Partial dependency may exist though the contributions made by the workman were at irregular intervals and in irregular amounts, and though the dependents have other means of support. *Hotel Bond Co's Appeal* (1915) 89 *Conn.* 143, 93 *Atl.* 245.

<sup>75</sup> *Muzik v. Erie R. Co.* (1913) 85 N. J. L. 129, 89 *Atl.* 248, 4 N. C. C. A. 732, affirmed in 86 N. J. L. 695, 92 *Atl.* 1087; *Jackson v. Erie R. Co.* (1914) 86 N. J. L. 550, 91 *Atl.* 1035, 6 N. C. C. A. 944.

<sup>76</sup> Under the Rhode Island statute, a father who was able out of his wages to support himself and wife, and save \$3 or \$4 per week, is not a dependent upon the son, although the latter gave his pay to his parents every week, and the father received a net profit of some \$5 a week from his son's wages over and above the amount given him for spending money and his board, lodging, and clothing. *Dazy v. Apponaug Co.* (1914) 36 R. I. 81, 89 *Atl.* 160, 4 N. C. C. A. 594. The court said: "The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with the ordinary necessities of life suitable for persons in their class and position. . . . The expression 'dependent' must be held to mean dependent for the ordinary necessities of life for a person of his class and position, and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside." *J. L. R. A.* 1916A.

crease his savings, is not "dependent" upon such wages within the meaning of the statute.<sup>76</sup>

Ordinarily a widow is conclusively presumed to be dependent;<sup>77</sup> and this presumption also exists in the case of minor children.<sup>78</sup> But the conclusive presumption of dependency of children provided for in the Massachusetts act is conditioned upon the nonexistence of a surviving dependent parent.<sup>79</sup> Whether or not a woman who has been living apart from her husband is dependent upon him is a question of fact.<sup>80</sup> The conclusive presumption of dependency does not exist in such a case.<sup>81</sup> So, a deserted

<sup>77</sup> *Coakley's Case* (1913) 216 *Mass.* 71, 102 N. E. 930, *Ann. Cas.* 1915A, 867, 4 N. C. C. A. 508.

<sup>78</sup> The presumption of dependency of the widow and daughter of a deceased workman is not rebutted by evidence that the deceased did not work steadily, that he was inclined to dissipation, and that he did not live at home all of the time, and that his wife's position was not very satisfactory, where there was evidence that when he did work he contributed a substantial part of his earnings towards the support of his wife and daughter, and that he and his wife were not living in a state of legal separation in any sense of the word. *Taylor v. Seabrook* (1915) — *N. J. L.* —, 94 *Atl.* 399.

A daughter of tender years of a deceased employee is conclusively presumed to be dependent, where her mother is also dead, although the deceased leaves a widow by his second marriage. *Coakley's Case* (*Mass.*) *supra*.

<sup>79</sup> Children of a deceased workman who are also the children of the widow are not conclusively presumed to be dependent, because as to them there is a surviving parent. (*Mass.*) *Ibid*.

In the absence of evidence to show the dependency of a minor child, it will not share with its mother in a fund recovered under the workmen's compensation act. *McNicol's Case* (1913) 215 *Mass.* 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522.

<sup>80</sup> Whether or not a servant accidentally killed in his employment, and his wife, whom he left in a foreign county, were living together, is a question of fact to be determined by the commission, under the Wisconsin act. *Northwestern Iron Co. v. Industrial Commission* (1913) 154 *Wis.* 97, post, 366, 142 N. W. 271, *Ann. Cas.* 1915B, 877.

<sup>81</sup> The conclusive presumption that a wife is totally dependent upon her husband does not apply to a case where a woman is actually living apart from her husband, although this condition may exist without fault on her part. *Gallagher's Case* (1914) 219 *Mass.* 140, 106 N. E. 558. In such a case the Industrial Accident Board should have determined as a question of fact the matter of dependency, without ref-

wife who at the time of her husband's death had for more than six years supported herself without compensation from him, or knowledge of his whereabouts, is not an actual dependent within the meaning of the 12th paragraph of the New Jersey act.<sup>82</sup> And where the wife and child of a deceased workman were both living apart from him at the time of his death, neither of them can be "conclusively presumed" to have been wholly dependent upon him for support.<sup>83</sup> But a wife who was left in a foreign land when her husband came to this country is within the provision of the workmen's compensation act, if he sent her money for her support, although he has been here several years, and no definite plans for reunion exist.<sup>84</sup>

A mother cannot recover compensation for the death of an adult unmarried son, where he lived apart from her, and had not contributed anything in support of her, and there was in force no order of the court compelling him to support her.<sup>85</sup> Dependent step-children who have been supported by a deceased workman are included within the word "children" as used in the act of 1911.<sup>86</sup>

A woman living in adulterous intercourse with a man was not "a member of the family" of the man, although a marriage ceremony had been performed and

gone through with, but the man at the time was incompetent to contract marriage because he had a wife or former wife from whom he had not been divorced one year, although the woman was not aware of the impediment, and believed that she was lawfully married.<sup>87</sup>

There is an apparent conflict of authority upon the question whether or not nonresident aliens are entitled to compensation for the death of a workman upon whose wages they were dependent. It has been expressly held that nonresident alien dependents are not entitled to compensation under the New Jersey act.<sup>88</sup> It was also held in the same case that such nonresident alien dependents had no cause of action for the death of the workman, where the employer had elected to come in under the New Jersey act. Compensation has been awarded, however, in other jurisdictions to nonresident alien dependents, but the question whether such dependents were within the purview of the statute was not discussed.<sup>89</sup>

A parent can be dependent upon the support of a minor child just as much as upon the support of an adult child.<sup>89a</sup>

There is no conclusive presumption that the nonresident parents of a deceased workman are dependent upon his earnings.<sup>90</sup> The question whether or not

erence to the conclusive presumption created by the act in case of wives living with their husbands.

The conclusive presumption that a wife is wholly dependent upon her husband "with whom she lived at the time of her death," as contained in part 2, § 7, of the Massachusetts compensation act, is not present where the couple were voluntarily living apart, and the wife was supporting herself out of her own earnings, and the husband had not spent any money for her support for upwards of a year, although at the time he left her he voluntarily gave her a sum of money, and promised to support her and her child. *Nelson's Case* (1914) 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694.

<sup>82</sup> *Batista v. West Jersey & S. R. Co.* (1913) — N. J. L. —, 88 Atl. 954, 4 N. C. C. A. 781.

<sup>83</sup> *Bentley's Case* (1914) 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

<sup>84</sup> *Northwestern Iron Co. v. Industrial Commission* (1913) 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877.

<sup>85</sup> *Pinel v. Rapid R. System* (1915) — Mich. —, 150 N. W. 897. The court said: "The most that can be said of the statute, with reference to the question involved, is that by its terms a court of competent jurisdiction might have, under certain contingencies, compelled the deceased, if able, to contribute to the support of his mother."

<sup>86</sup> *Newark Paving Co. v. Klotz* (1914) 85 N. J. 432, 91 Atl. 91. L.R.A.1916A.

<sup>87</sup> *Armstrong v. Industrial Commission* (1915) — Wis. —, 154 N. W. 845.

<sup>88</sup> *Gregutis v. Waelark Wire Works* (1914) — N. J. L. —, 91 Atl. 98. The court said: "The power of the legislature to give or withhold a right of action in such a case, and to declare to whom and in what amount compensation shall be made, cannot be doubted."

<sup>89</sup> The mother and sister of a deceased workman, who were residents of Italy, were held to be dependent in *Caliendo's Case* (1914) 219 Mass. 498, 107 N. E. 370, but the fact that they resided abroad was not discussed by the court.

In *Vujic v. Youngstown Sheet & Tube Co.* (1914) 220 Fed. 390, an award of compensation was made to the nonresident alien dependents of a deceased workman. This decision was under the Ohio statute, and there is no discussion of the question whether alien nonresident dependents are entitled to recover.

In *State ex rel. Crookston Lumber Co. v. District Ct.* (1915) — Minn. —, 154 N. W. 509, compensation for the death of an employee was awarded to his widowed mother, residing in Norway, where the deceased had formerly resided; but no question was raised as to the right of nonresident aliens to compensation.

<sup>89a</sup> *Frischia v. Drake Bros. Co.* (1915) 167 App. Div. 496, 153 N. Y. Supp. 392.

<sup>90</sup> *Garcia v. Industrial Acci. Commission* (1915) — Cal. —, 151 Pac. 741.



such near relatives as parents, children, brothers, and sisters are dependent, is a question of fact,<sup>91</sup> and the finding of the commission or board or trial court will not be disturbed if there is evidence to support it.<sup>92</sup>

The statute does not require that the award shall be apportioned between the respective dependents, except in cases where there is a special application made for that purpose.<sup>93</sup> The insurer is not

entitled to be heard upon the question of the division of the payment.<sup>93a</sup>

The consul of Austria Hungary is a proper person to whom to pay an award of compensation to the widow and children of the deceased employee, who are residents and citizens of that country.<sup>94</sup>

A few cases have passed upon the question as to how the compensation is to be divided in cases in which there are more than one dependent.<sup>95</sup>

<sup>91</sup> Whether or not a mother was dependent upon the earnings of a deceased son is a question of fact. *Hotel Bond Co's Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

Whether or not a daughter was dependent wholly or partly upon her deceased father for support is a question of fact. *Herrick's Case* (1914) 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554.

Whether or not the father and mother and minor brothers and sisters of a deceased workman, living together in the same household, and subsisting in part on the earnings contributed by the deceased to his father, and applied by the latter to the support of himself and his family, were actual dependents upon the deceased, is a question of fact for the trial judge to determine. *Havey v. Erie A. Co.* (1915) — N. J. L. —, 95 Atl. 124.

Whether the mother and sister of a deceased employee, to whose support he had contributed, were wholly dependent upon him within the provision of the statute, is a question of fact. *Caliendo's Case* (1914) 219 Mass. 498, 107 N. E. 370.

If there is any evidence to support the finding of the commission that the mother and brother of a deceased workman were dependent upon him for support at the time of his death, the decision of the commission is final, and the court is not authorized to review such findings. *Hendricks v. Seeman* (1915) — App. Div. —, 155 N. Y. Supp. 638.

<sup>92</sup> The finding by the Industrial Accident Board that a sister was dependent upon another sister will not be disturbed where the evidence as to the independent financial condition of the applicant was very vague and unsatisfactory. *Buckley's Case* (1914) 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613.

Testimony tending to establish the fact that a deceased workman gave his wages to his father, and that such wages were devoted to the support of the family, is sufficient to afford a legal basis for the finding of the trial judge that the members of the family, consisting of the father, mother, and minor brothers and sisters of the deceased, were actual dependents upon the earnings of the deceased. *Havey v. Erie R. Co.* (1915) — N. J. L. —, 95 Atl. 124.

Testimony before the trial judge that each of the eight minor brothers and sisters of the deceased workman was under the age of fourteen years will support an award

of compensation in behalf of such minor brothers and sisters for a period of three years, since it is a fair inference that several of such children are of very tender age, and also that there will be several of them at the expiration of the three years who will not have reached the age of sixteen, the age fixed by a statute when payments on account of children shall cease. (N. J.) *Ibid.*

Proof that an employee's mother has no property, that the workman and his sister took care of her, and that they all kept house together, is sufficient to show that the mother is a dependent. *Stevenson v. Illinois Watch Case Co.* (1914) 186 Ill. App. 418, 5 N. C. C. A. 858.

Proof that, prior to and up to the time of his death, the decedent gave his earnings to his father, and that the father had no other income or means of support, justifies the finding that the father was an actual dependent of the deceased. *Reardon v. Philadelphia & R. R. Co.* (1913) 85 N. J. L. 90, 88 Atl. 970, 4 N. C. C. A. 776.

<sup>93</sup> *Taylor v. Seabrook* (1915) — N. J. L. —, 94 Atl. 399.

<sup>93a</sup> *Janes's Case* (1914) 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552.

<sup>94</sup> *Vujic v. Youngstown Sheet & Tube Co.* (1914) 220 Fed. 390.

<sup>95</sup> Payment of compensation on account of the death of a workman who left surviving a daughter by a former marriage, and a widow with children by the second marriage, should be equally divided between the widow and the daughter of the earlier marriage, who has no surviving parents. *Coakley's Case* (1913) 216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867, 4 N. C. C. A. 508.

Under the New York statute where a workman who has been killed leaves a wife and also children the additional amount which is allotted for the support of the several children is to be paid to the wife. *Woodcock v. Walker* (1915) — App. Div. —, 155 N. Y. Supp. 702.

Where a deceased workman left two minor children found to be wholly dependent upon him, and one of the children died about a week after the employee, a decree to the effect that the sum allowed under the act should be paid to the administrator of the estate of the deceased employee, and by him be divided between the guardian of the surviving minor child and the administrator of the deceased minor child, cannot be attacked by the insurer. *Janes's*

The right of a dependent to recover compensation for the death of an employee is dependent upon the law in effect at the time of the death, and not on the law in effect at the time of the accident.<sup>96</sup>

### XXXIX. Compensation recoverable.

#### a. By dependents.

It has been stated that the purpose of the Minnesota act was to secure the widow or dependent next of kin of an employee who should meet an accidental death while engaged in the line of his employment, a percentage income based upon their pecuniary loss; and the salary or compensation actually received by such employee at the time of his death represents such loss.<sup>97</sup> Consequently, in determining compensation, it is immaterial whether the claimant inherited anything from the estate of the employee.<sup>98</sup>

The New Jersey statute provides for only two instances in which the award of the maximum 60 per cent of the wages is authorized; first, where there are orphans; and second, where there is a widow with five or more children; the award should not exceed 50 per cent of the deceased wages where the depend-

ents consisted of a father and mother and minor children.<sup>99</sup> A judgment of compensation for the dependents of a deceased workman should be for the amount of the weekly payment for the prescribed number of weeks, and not for a sum equal to the products of these two numbers.<sup>1</sup> Compensation may be awarded under the New Jersey act to a mother who is an actual dependent upon a deceased son, although the son leaves no widow, and no specific amount is fixed by way of compensation to the mother where the decedent leaves no widow.<sup>2</sup> A similar rule has been applied in a case arising under the New York statute where there was some ambiguity in the language of the statute.<sup>2a</sup> But a childless widow is entitled to but 25 per cent of the wages although the deceased left a father, where there was no proof that the father or anyone other than the widow was dependent.<sup>3</sup>

Under the Illinois act, non-dependent brothers and sisters are not entitled to participate with a dependent mother in the compensation recovered.<sup>3a</sup>

The minimum compensation for the death of an employee to a person wholly dependent upon him is \$6 a week for 300 weeks.<sup>4</sup>

Case (1914) 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552. The court said: "The workmen's compensation act does not contemplate, either in its letter or its spirit, that the insurer may litigate by appeal to this court the proportions of the division of a payment among those claiming to be dependents upon a deceased employee, when the dependents are satisfied and do not appeal, and when the insurer cannot by any possibility be affected in its pecuniary responsibility by any modification of the order for payment permitted by law."

<sup>96</sup> State ex rel. Carlson v. District Ct. (1915) — Minn. —, 154 N. W. 661.

<sup>97</sup> State ex rel. Gaylord Farmers' Co-op. Creamery Asso. v. District Ct. 128 Minn. 486, 151 N. W. 182.

<sup>98</sup> State ex rel. Crookston Lumber Co. v. District Ct. (1915) — Minn. —, 154 N. W. 509.

<sup>99</sup> Havey v. Erie R. Co. (1915) — N. J. L. —, 95 Atl. 124.

<sup>1</sup> Huzik v. Erie R. Co. 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732, affirmed in 86 N. J. L. 695, 92 Atl. 1087.

<sup>2</sup> Quinlan v. Barber Asphalt Paving Co. (1913) 84 N. J. L. 510, 87 Atl. 127; Blanz v. Erie R. Co. (1913) 84 N. J. L. 35, 85 Atl. 1030; McFarland v. Central R. Co. (1913) 84 N. J. L. 435, 87 Atl. 144, 4 N. C. C. A. 592; Tischman v. Central R. Co. (1913) 84 N. J. L. 527, 87 Atl. 144, 4 N. C. C. A. 736; Reardon v. Philadelphia & R. R. Co. (1913) 85 N. J. L. 90, 88 Atl. 970, 4 N. C. C. A. 776.

In Blanz v. Erie R. Co. 84 N. J. L. 35, 85 L.R.A.1916A.

Atl. 1030, the court took the view that although the section of the statute containing the schedule of compensation contains no specific amount to be paid by way of compensation to the mother where the decedent leaves no widow, yet the section does provide that in case of a widow alone, the compensation shall be 25 per cent of the wages, and that in the case of a widow and father or mother, it shall be 50 per cent of the wages; and a comparison of these two clauses leads almost irresistibly to the conclusion that the intent of the legislature was to allow a compensation of 25 per cent where there was a mother alone or a father alone.

<sup>2a</sup> The New York statute makes provision for dependent parents although the deceased workman left no surviving wife or children. Friscia v. Drake Bros. Co., (1915) 167 App. Div. 496, 153 N. Y. Supp. 392.

<sup>3</sup> Miller v. Public Service R. Co. (1913) 84 N. J. L. 174, 85 Atl. 1030. Paragraph 12 of the New Jersey act contains the line, "if a widow and father or mother, 50 per centum of wages;" but the court took the view that in order that the 50 per centum should be recoverable, not only the widow, but also the father or mother, must be shown to be dependents.

<sup>3a</sup> Matecny v. Vierling Steel Works (1914) 187 Ill. App. 448.

<sup>4</sup> State ex rel. Crookston Lumber Co. v. District Ct. (1915) — Minn. —, 154 N. W. 509.



A commissioner does not necessarily err in making an award of \$5 a week in a case in which the dependency did not approximate that sum.<sup>5</sup>

Under §. 5 of the Washington act, in case of the death of a minor compensation to the parent does not, as a matter of course, terminate at the time at which he would have arrived at the age of twenty-one years; if the parents or parent are dependent, then the compensation is to continue during the dependence of such parents or parent.<sup>6</sup>

The statutory amount of compensation in case of death is not subject to deduction or offset.<sup>7</sup> An injured workman who, upon his return to work, receives from the employer the precise amount to which he is entitled as compensation, and executes a release by which he releases the employer from all claims "which I may have" under the compensation act, does not thereby bar his widow from receiving compensation for his death which subsequently ensued as a result of the injury.<sup>8</sup> The amount which a father expends for the maintenance and support of his son is not to be deducted from the minimum compensation recoverable in case of the death of the son, where such son contributed all of his earnings to his father.<sup>9</sup> Under the Wisconsin act, there is to be no reduction because of the advanced age of an employee in cases where the employee is killed and compensation is sought by his dependents.<sup>10</sup>

#### *b. By incapacitated employee.*

Under the English act, the amount of weekly payments to be awarded to an

injured employee is within the discretion of the arbitrator, subject only to the statutory maximum, and these payments are to be continued until the award has been changed upon review. Some of the American statutes follow the English method of fixing the compensation, while others adopt various other methods. In some, specific amounts based on the employee's earnings are fixed for certain specified injuries. As, for instance, if the employee suffers the loss of a hand, he is entitled to a certain percentage of his wages for a specified period; if he also suffers the loss of a foot, he is entitled to an additional percentage of his wages for a fixed period. In some instances the two awards run concurrently, and in others, they run consecutively. In other statutes it is provided that in the case of the injury mentioned, namely, the loss of a hand and of a foot, there will be but one award for the resulting incapacity, and the payment therefor will run for a specified time. Owing to the differences in the terms of the statute, and to the different situations arising from the varying facts in the particular cases, it is very difficult to deduce any general principles as to the awarding of compensation in the case of injuries to workmen. Perhaps the most definite statement that can be made is that it is the purpose of all other statutes to render compensation because of incapacity for work, and the consequent decrease of the wage-earning ability of the employee; and this compensation is determined with reference to the earnings of the employee and the extent of his incapacity.<sup>11</sup>

<sup>5</sup> Hotel Bond Co's Appeal (1915) — Conn. —, 93 Atl. 245.

<sup>6</sup> Boyd v. Pratt (1913) 72 Wash. 306, 130 Pac. 371.

<sup>7</sup> State ex rel. Crookston Lumber Co. v. District Ct. (Minn.) supra.

The amount of compensation to be received by a widow is not to be diminished by any compensation paid to the workman after his injury, and prior to his death. Nichols's Case (1914) 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862, 4 N. C. C. A. 546.

The period of time which a workman worked after his injury, and before his death, is not to be deducted from the 300 weeks for which time his dependents shall be entitled to a weekly payment equal to one half of his average weekly wages. Cripp's Case (1914) 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828.

<sup>8</sup> Milwaukee Coke & Gas Co. v. Industrial Commission (1915) 160 Wis. 247, 151 N. W. 245. The court said that there were two grounds for this ruling: First, that there was no consideration for the release, and L.R.A.1916A.

second, that no act of the employee could estop the dependent, since the act provided for two distinct proceedings one by the employee during his lifetime, and another by the dependent after the death of the employee.

<sup>9</sup> Where the minor son contributed all of his earnings, amounting to \$5.67 a week, to his father, the latter is entitled to compensation, upon the son's death, to the whole of the minimum compensation of \$4 a week, notwithstanding that about \$2.50 per week was expended for the support of the son. Murphy's Case (1914) 218 Mass. 278, 105 N. E. 635, 5 N. C. C. A. 716.

<sup>10</sup> Milwaukee v. Ritzow, 158 Wis. 376, 149 N. W. 480. The court held that although, in case of permanent injury, there were to be reductions on account of the advanced age of the employee, the term "permanent injury" is used in the ordinary sense, and cannot be extended to include the case of injuries resulting in death.

<sup>11</sup> In State ex rel. Crookston Lumber Co. v. District Ct. (1915) — Minn. —, 154 N.

"Incapacity for work," within the meaning of the statute, includes inability to procure work because of the injury, as well as inability to do the work.<sup>12</sup> So, a finding of inability to secure employment because of the injury is equivalent to the finding of total incapacity for work.<sup>13</sup> And the finding of the Committee of Arbitration that a workman did not make any effort to obtain employment is immaterial where the Industrial Accident Board finds that during the time in question the employee was physically unable to earn anything.<sup>14</sup>

In the New Jersey act the word "dis-

ability" is not restricted to the mere loss of earning power;<sup>15</sup> there may be a statutory "disability" although it appears that the earnings of the petitioner have not been impaired.<sup>16</sup> But, under the New York statute, compensation is based solely on loss of earning power.<sup>17</sup> So, under the Rhode Island statute, if the petitioner has presented no evidence showing loss of earning capacity, the court cannot make an award of compensation.<sup>18</sup>

And under the Michigan statute there can be no compensation for permanent injury where the injured member is not

W. 509, the court said: "The scheme of the compensation act was to make the amount to be recovered in case of accident a certain fixed sum, and by thus fixing an arbitrary standard to avoid the necessity of embarking on a troublesome inquiry as to the damages actually sustained."

The scheme of the New York statute is essentially and fundamentally one for the creation of a state fund to secure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. *Jensen v. Southern P. Co.* (1915) 215 N. Y. 514, post, 403, 109 N. E. 600.

<sup>12</sup> *Sullivan's Case* (1914) 218 Mass. 141, post, 378, 105 N. E. 463, 5 N. C. C. A. 735. The court relied upon two English decisions, *Ball v. William Hunt & Son* [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459, and *Macdonald v. Wilson's & C. Coal Co.* [1912] A. C. (Eng.) 513, 81 L. J. P. C. N. S. 188, 106 L. T. N. S. 905, 28 Times L. R. 431, 56 Sol. Jo. 550, [1912] S. C. 74, 49 Scot. L. R. 708, 5 B. W. C. C. 478. The court said: "If, as in this case, the injured employee, by reason of his injury, is unable, in spite of diligent efforts, to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work, if practically the labor market were not thus closed to him. He has become unable to earn anything. He has lost his capacity to work for wages, and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself, and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that, because he could do some work if he could get it, he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work."

Incapacity for work within the meaning of the Kansas statute means inability to perform work and also inability to secure L.R.A.1916A.

work to do. *Gorrell v. Battelle* (1914) 93 Kan. 370, 144 Pac. 244.

The finding by the Board that a workman "is totally incapacitated for all work except that which will allow him to be seated while engaged in its performance" cannot be construed as a finding that because he is physically able to perform certain labor, he is not totally incapacitated for work; the further finding of the Board that the workman "has endeavored to obtain and has been unable to find any work which the incapacity due to the injury will not prevent him from performing" warranted a finding that he was totally incapacitated for work, although he had a limited physical capacity to work and earn money. *Duprey's Case*, (1914) 219 Mass. 189, 106 N. E. 686.

<sup>13</sup> *Stickley's Case* (1914) 219 Mass. 513, 107 N. E. 350.

<sup>14</sup> *Septimo's Case* (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.

<sup>15</sup> The mere fact that an injured workman was employed at the same work and the same wages as before the injury will not disentitle him to compensation under the act if his physical efficiency has been substantially impaired. *Burbage v. Lee* (1915) — N. J. L. —, 93 Atl. 859.

<sup>16</sup> *De Zeng Standard Co. v. Pressey* (1914) 86 N. J. L. 469, 92 Atl. 278. The court, in holding that the disability intended was a disability due to the loss of a member or part of a member or a function, rather than the mere loss of earning power, said: "Even if this were not so, it does not follow that the injured employee had not sustained a distinct loss of earning power in the near or not remote future for which the award is intended to compensate. If it were a question of damages at common law, the elements of damage would consist of present loss of wages, probable future loss of wages, pain and suffering, and temporary or permanent disability, which loss the jury would be at liberty to assess quite independently of the fact that the plaintiff was earning the same wages, except so far as that fact might be evidential with regard to the extent of the disability."

<sup>17</sup> *Jensen v. Southern P. Co.* (1915) 215 N. Y. 514, post, 403, 109 N. E. 600.

<sup>18</sup> *Weber v. American Silk Spinning Co.* (1915) — R. I. —, 95 Atl. 603.



lost, and the workman can do his work as well as ever.<sup>19</sup> So, under the Wisconsin statute, unless the earning capacity of the claimant in the employment in which he was at the time he was injured has been impaired, there can be no recovery for permanent disability.<sup>20</sup> But it is to be noticed that the incapacity of the workman is determined with reference to his ability to do the work at which he was engaged at the time of the accident.<sup>21</sup>

In a number of cases it has been held that compensation is recoverable although the injury results in disfigurement only, without any loss of earning power.<sup>22</sup> And under the Illinois act an employee may recover compensation for disfigurement in addition to the compensation he recovers because of incapacity to work.<sup>23</sup>

<sup>19</sup> There can be no compensation for the partial permanent injury to an eye, where the claimant concedes that he can do his work as well as before the injury, and that he is receiving the same wages therefor, since the statute makes no provision for anything less than the loss of an eye. *Hirschhorn v. Fiege Desk Co.* (1915) — Mich. —, 150 N. W. 851.

<sup>20</sup> *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

<sup>21</sup> One who, by the loss of a thumb and finger on one hand, is disabled from following the particular calling in which he was engaged, is entitled to compensation for total disability, regardless of what he may be able to earn in other occupations. *Mellen Lumber Co. v. Industrial Commission* (1913) 154 Wis. 114, post, 374, 142 N. W. 187, Ann. Cas. 1915B, 997.

<sup>22</sup> In *International Harvester Co. v. Industrial Commission* (Wis.) supra, the court took the view that mere disfigurement must be taken into consideration, although the workman was physically capable of doing his usual work in a satisfactory manner.

Under the Illinois act, an employee is entitled to receive compensation for the disfigurement caused by the loss of the tips of two fingers of his right hand, as provided for in clause C of § 5 of the act of 1911, although the employee was actually incapacitated, and received compensation during the period of total incapacity. *Stevenson v. Illinois Watch Case Co.* (1914) 186 Ill. App. 418, 5 N. C. C. A. 858. The court said: "It is quite conceivable that a workman might lose his entire hand, and after he recovered from the immediate consequences of the injury, because of such loss, engage in some profession or calling where his earnings would be much larger than in the employment in which he was injured. Under appellant's construction of the law, he would be entitled to recover under clause B for the time lost from the immediate effects of the injury, and would L.R.A.1916A.

Under the Massachusetts act, compensation for incapacity to work is recoverable where such incapacity is the result of the injury, although the man's physical condition was such that, even if uninjured, his capacity to work would continue but for a relatively short time.<sup>24</sup>

Under the Minnesota statute, an employer is liable only for the incapacity resulting from an injury while in his employment, although such injury, combining with the previous physical condition of the employee, renders him totally disabled.<sup>25</sup> But a workman who had previously lost a hand is, upon the loss of his other hand, entitled to compensation as for total disability, and not compensation merely for the loss of one hand under the New York statute.<sup>26</sup>

The Massachusetts Industrial Accident

be driven to clause D for any recovery for disfigurement, and could not recover under that clause because there would appear no comparative loss in his earnings. The legislature should not be held to intend such a result unless its language admits no other reasonable construction, and we are of the opinion that the language in clause C can be reasonably construed as providing for compensation for the disfigurement in such cases." In this case, an award of \$454.08 was held not excessive for disfigurement where the employee suffered the loss of about one quarter of an inch of the bone from the ends of the first and second fingers of the right hand, leaving only a small portion of the nail of each of these fingers remaining.

<sup>23</sup> Section 5, ¶ c, of the Illinois act is intended to provide compensation for disfigurement, and it would be unreasonable to construe it as providing such compensation in cases where the disfigurement did not cause any cessation of work, and denying it in other cases where disfigurement did cause a few days' incapacity. *Watters v. P. E. Kroehler Mfg. Co.* (1914) 187 Ill. App. 548, 8 N. C. C. A. 352.

<sup>24</sup> The finding by the Industrial Accident Board that the employee is a man of failing physical power, and that probably he will be incapacitated for work in a few years as the result of such physical weakness, independently of his injury, does not bar him from compensation under the act if his incapacity to work is a result of his injury. *Duprey's Case* (1914) 219 Mass. 189, 106 N. E. 686.

<sup>25</sup> An employee who suffers an injury resulting in the loss of an eye is entitled to compensation as for partial incapacity only, although he had previously lost the other eye, with the result that the second injury left him totally incapacitated. *State ex rel. Garwin v. District Ct.* (1915) 129 Minn. 156, 151 N. W. 910, 8 N. C. C. A. 1052.

<sup>26</sup> *Schwab v. Emporium Forestry Co.* (1915) 167 App. Div. 614, 153 N. Y. Supp. 234.

Board may award payment as for partial disability after payment for total disability has ceased.<sup>27</sup> So, under the New Jersey act an allowance may be awarded for both a temporary and a permanent injury.<sup>28</sup> Temporary as distinguished from permanent disability under the New Jersey compensation act is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit.<sup>29</sup> So, the trial court errs in classifying the "consolidation" of two injuries of the left lung as temporary after it had healed as much as it would ever heal, thus extending the allowance for temporary disability much longer than the evidence warranted.<sup>30</sup>

Where several fingers are permanently injured in the same accident, the total award is properly composed of separate awards for the injury to each finger as fixed by the statute, not to exceed, however, the amount provided for the loss of a hand.<sup>31</sup> But where the employee suffered permanent injuries to the hand and forearm below the elbow, and also permanent partial disability to the arm

above the elbow, the court should determine the percentage of total disability of the arm as a whole, and not attempt to divide the injuries into two units, those of the hand and those of the arm.<sup>32</sup>

Where, under the New York statute, a claimant has been allowed compensation to the full amount allowed for total disability, he cannot be awarded further compensation on account of other injuries arising out of the same accident, which second award should run concurrently with the first award.<sup>33</sup> So, under the Michigan statute, an employee is not entitled to a specific indemnity for the loss of a foot in addition to compensation for disability.<sup>34</sup> And under part II. § 11, of the Massachusetts act, as amended by statute 1913, chapter 696, additional compensation cannot be awarded for an injury to a phalange not resulting in the permanent incapacity for use of the entire finger.<sup>35</sup> But compensation may be granted for injury to one hand, and also further additional compensation for injury to the fingers of the other hand.<sup>36</sup>

The provisions of the statute giving additional compensation for the loss or

<sup>27</sup> An employee who has received an award based on total disability of a weekly compensation to be paid until a fixed date, is not precluded from applying to the board under part 3, § 12, of the Massachusetts act, before his weekly payment has ceased. *Hunnewell's Case* (1915) 220 *Mass.* 351, 107 *N. E.* 934.

<sup>28</sup> *Maziarski v. George A. Ohl & Co.* (1914) 86 *N. J. L.* 692, 93 *Atl.* 110.

Where an employee lost several fingers on either hand, and there was also a temporary disability partly due to an infection of the left hand, damages may be allowed for the partial but permanent injury to the fingers, and also, in addition, for the temporary disability arising from the infection. *Nitram Co. v. Court of Common Pleas* (1913) 84 *N. J. L.* 243, 86 *Atl.* 435. The court said that even if this construction would lead to the result that a recovery under the clauses C and A for temporary and partial disability might exceed the maximum recoverable under clause D relating to complete disability, the court could not say that this result was not contemplated by the legislature, since any other construction would be in disregard of the plain language of the act.

<sup>29</sup> *Vishney v. Empire Steel & I. Co.* (1915) — *N. J. L.* —, 95 *Atl.* 143.

<sup>30</sup> *Birmingham v. Lehigh & W. Coal Co.* (1915) — *N. J. L.* —, 95 *Atl.* 242.

<sup>31</sup> *George W. Helme Co. v. Middlesex Common Pleas* (1913) 84 *N. J. L.* 531, 87 *Atl.* 72, 4 *N. C. C. A.* 674.

<sup>32</sup> *State ex rel. Kennedy v. District Ct.* (1915) 129 *Minn.* 91, 151 *N. W.* 530, 8 *N. C. C. A.* 478.

<sup>33</sup> *Fredenburg v. Empire United R. Co.* *L.R.A.* 1916A.

(1915) 168 *App. Div.* 618, 154 *N. Y. Supp.* 351. The court, however, added: "We are not to be understood as holding that if, at the expiration of the 205 weeks, disability of claimant shall exist by reason of the injuries resulting from this accident other than the disability arising from the loss of the foot, and claimant will not be entitled to a further award on account thereof, but as simply holding that the claimant by the first award having been allowed compensation to the full amount allowed for total disability could not by the second award be awarded further compensation for total disability on account of other injuries arising out of the same accident, which second award should run concurrently with the first award."

<sup>34</sup> The period of disability deemed to exist under the Michigan statute in case of a loss of a foot is not extended because, as a further result of the accident, the employee was in fact totally disabled for a longer or shorter period. *Limron v. Blair* (1914) 181 *Mich.* 76, 147 *N. W.* 546, 5 *N. C. C. A.* 866. The court said: "The statute speaks in terms of disability, all of its provisions being considered, it does not mean that compensation must be paid during a period of actual disability, and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability."

<sup>35</sup> *Ethier's Case* (1914) 217 *Mass.* 511, 105 *N. E.* 376, 5 *N. C. C. A.* 611.

<sup>36</sup> *Meley's Case* (1914) 219 *Mass.* 136, 106 *N. E.* 559.



incapacity of certain members of the body ceases to be applicable upon the death of the employee.<sup>37</sup>

The "loss" of a member within the meaning of the Wisconsin act has reference to the physical loss of the member, and not to its impairment by the injury.<sup>38</sup> But "incapacity of use" within the meaning of the Massachusetts act need not be tantamount to an actual severance of the member; it is enough that the normal use of it has been taken entirely away.<sup>39</sup> So, too, compensation is properly allowed for permanent incapacity to both legs, although as a matter of fact, the legs themselves had not been injured, but the accident was to the spine, which resulted in the paralysis of the legs.<sup>40</sup> And the complete loss of the index, second, and third fingers, and an injury to the fourth finger which makes it stiff and practically useless, amount to such a "permanent loss of the use of the hand" which is to be considered as the equivalent of the loss of the hand within § 15 of the New York act.<sup>41</sup> And an award as for the loss of an entire phalange of a finger was sustained although the Commission found that the claimant's injury resulted in "the amputation of the third finger on the right hand near the first joint," and in another

place stated that "in the amputation of the third finger about one third of the bone of the distal phalange was cut off."<sup>42</sup>

But the New York statutes will not be construed so that a person who has lost the entire use of a finger, only a portion of which is amputated, would be entitled to a larger compensation than one who has suffered the absolute amputation of the entire finger.<sup>43</sup> And the amputation of the index finger between the second joint and the third joint, and the severance of a small piece of bone and pieces of tendons and flesh of thumb, do not amount to the "loss by severance at or above the second joint of two or more fingers, including thumb."<sup>44</sup> Under the New Jersey statute it is error to award greater compensation for an injury to an ankle than is allowed by the statute for the loss of a foot.<sup>45</sup>

Under the California statute, compensation may be awarded for permanent disability amounting to less than 10 per cent of total disability, although the statute only specifically provides for disability amounting to 10 per cent, 20 per cent, and so on in gradations up to 100 per cent, and for disabilities "in intermediate to those fixed" as above.<sup>46</sup>

<sup>37</sup> Burns's Case (1914) 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635. The court said: "The question whether, if during his lifetime, and upon his own petition, this specific compensation had been ordered for a stated number of weeks, and his death had occurred before the expiration of that period, the right thus adjudicated would cease at his death, or whether the payments must be continued until the end of the appointed time for the benefit of his dependents, is not raised here, and of course has not been passed upon."

<sup>38</sup> Northwestern Fuel Co. v. Leips (1915) — Wis. —, 152 N. W. 856.

<sup>39</sup> Where a hand cannot be used in its ordinary manner, but can be used only as a hook, it is "incapable of use" within the meaning of the act, and the incapacity of use need not be tantamount to the actual severance of the hand. Meley's Case (1914) 219 Mass. 136, 106 N. E. 559.

The words "incapable of use" in the Massachusetts act, Stat. 1911, chap. 751, pt. 2, § 11, as amended by Stat. 1914, chap. 708, providing that the additional amount to be paid in case of a loss of a hand shall also be paid where the hand is not lost, but so injured as to be permanently incapable of use, apply to a case where the hand of the workman was injured to the extent that he had the ability only to use the hand to the extent of a small amount of motion in the thumb and first finger with the middle, ring, and little fingers paralyzed, and with an interference of the circulation to such a degree that the hand goes to sleep. Floccher v. Fidelity & D. Co. (1915) — Mass. —, 108 N. E. 1032.

<sup>40</sup> Burns's Case (1914) 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635.

<sup>41</sup> Rockwell v. Lewis (1915) 168 App. Div. 674, 154 N. Y. Supp. 893.

<sup>42</sup> Re Petrie (1915) 215 N. Y. 335, 109 N. E. 549.

<sup>43</sup> Feinmen v. Albert Mfg. Co. (1915) — App. Div. —, 155 N. Y. Supp. 909, followed by Possner v. Smith Metal Bed Co. (1915) — App. Div. —, 155 N. Y. Supp. 912; O'Neil v. West Side Storage Warehouse Co. (1915) — App. Div. —, 155 N. Y. Supp. 912.

<sup>44</sup> Weber v. American Silk Spinning Co. (1915) — R. I. —, 95 Atl. 603.

<sup>45</sup> Whether greater compensation could be allowed for an injury to the ankle than the stipulated compensation for the loss of a foot is not a question of fact, but a question of law, involving the construction of the statute, which the supreme court could decide; whether the compensation to be allowed for such an injury shall be equal to that provided for the loss of a foot is a matter for the determination of the trial judge. Rakiec v. Delaware, L. & W. R. Co. (1913) — N. J. L. —, 88 Atl. 953.

<sup>46</sup> The Commission may allow compensation for a permanent disability which amounts to but 2½ per cent of total disability. Massachusetts Bonding & Ins. Co.

Whether the loss of several fingers is permanent total disability or permanent partial disability is a question of law, and the employer is not entitled to a jury trial of the question.<sup>47</sup>

A decision of the Industrial Accident Board to end all payments under the act ends the matter, and the Board is without power to revive it.<sup>48</sup>

An injured employee is required to take all reasonable means to recover his earning capacity.<sup>49</sup> Whether or not a workman will be held barred from compensation for refusing to submit to an operation depends upon all of the facts

of the case, including his mental condition, the severity and dangers of the operation in question, and the extent of the recovery to be anticipated as a result of the operation.<sup>50</sup> The refusal of an employee to submit to an operation cannot be said to be unreasonable, where it appears that a risk of life is involved, although such risk is very slight.<sup>51</sup> And it is error for the trial court to make an award as for temporary disability upon the theory that the injury may be cured by an operation, and that it is the duty of the employee to undergo it.<sup>52</sup>

The question of the employee's inca-

v. Pillsbury (1915) — Cal. —, 151 Pac. 419.

<sup>47</sup> And an award of \$1,200 for the loss of several fingers of a hand cannot be said to be arbitrary on the complaint of the employee, where the maximum amount for any permanent partial disability is \$1,500. *Sinnes v. Daggett* (1914) 80 Wash. 673, 142 Pac. 5.

<sup>48</sup> As the Massachusetts act, relative to the powers of the Industrial Accident Board to review its decision unqualifiedly terminating all payments, is in substantially the same words as the English act, the English decisions made before the passage of our act are strongly persuasive of the meaning intended by the general court in passing the act. *Hunnewell's Case* (1915) 220 Mass. 351, 107 N. E. 934.

<sup>49</sup> No compensation is recoverable for the additional incapacity caused by the aggravation of a wound received in the course of the employment, caused by the workman's engaging in a boxing match before the wound had completely healed. *Kill v. Industrial Commission* (1915) 160 Wis. 549, ante, 14, 152 N. W. 148.

The question whether an injured employee neglected to take the proper means for recovery from the injuries is a question of fact for the justice of the superior court, and his conclusions will not be reviewed where the employee presented testimony as to his conduct with reference to the injuries, the diligence which he had used in obtaining the treatment of the injury by a physician, the nature of such treatment, and the care that he had taken in the matter to follow the instructions of his physician. *Corral v. William H. Hamlyn & Son* (1915) — R. I. —, 94 Atl. 877.

<sup>50</sup> The refusal of an injured workman, a foreigner, unable to speak or understand the English language, and suffering great pain, to submit to a serious operation until fifteen or sixteen hours after it is first found necessary, is not, as a matter of law, so unreasonable and persistent as to amount to the refusal of medical attendance, and defeat his widow's right to compensation. *Jendrus v. Detroit Steel Product Co.* (1913) 178 Mich. 265, post, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864.

If a workman is not to be subjected to L.R.A.1916A.

unusual risk and danger arising from the anesthetic to be employed, or from the nature of the proposed operation, it is his duty to submit if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain. But it would be unreasonable to require an injured workman to submit to an operation upon his hand where, according to the expert testimony, it would be "pretty close to being permanently incapacitated for use even after this operation," and there was doubt as to the time within which some uncertain and indeterminate degree of benefit reasonably might be expected. *Floccher v. Fidelity & D. Co.* (1915) — Mass. —, 108 N. E. 1032.

<sup>51</sup> In *McNally v. Hudson & M. R. Co.* (1915) — N. J. L. —, 95 Atl. 122, in speaking of the duty of an employee to submit to an operation, the court said: "Although the peril to life seems to be very slight,—forty-eight chances in twenty-three thousand,—nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized."

<sup>52</sup> The trial court errs in basing an award of compensation for injury in the eye upon the theory of a temporary disability where he himself finds that the disability will be permanent unless there is an operation. *Feldman v. Braunstein* (1915) — N. J. L. —, 93 Atl. 679. The court said: "It is clear that the legislature never meant to put the control in the hands of one party alone. It is for the court, under the statute, to determine the compensation, and the court can act only on the facts before it, not upon the uncertain possibilities of the future."

The trial judge, having found that an injury would be permanent unless the employee submitted to an operation, should not make an award as for a temporary disability, on the theory that the injury can be cured by an operation, and that it is the duty of the employee to submit to it. *McNally v. Hudson & M. R. Co.* (N. J.) supra.



capacity to work is a question of fact, and the courts, on appeal, will not interfere with the finding of the trial court or of a Commission if there is any evidence to support the finding.<sup>53</sup> An employee is not precluded from claiming total incapacity by reason of the finding of a committee of arbitration that he agreed to a settlement on the basis of partial disability, which would cease at the end of 104 weeks, where that agreement was made after the committee had found that total disability would cease on a certain day, to which finding, however, the employee did not consent, and did not waive his right to appeal therefrom.<sup>54</sup>

It has been said that the compensation fixed by the statute is not to be taken as a measure of the damages recoverable in an action at law,<sup>55</sup> and also that the principles of the common law can be of little assistance in measuring the right of the workman to claim compensation under the industrial insurance law.<sup>56</sup>

<sup>53</sup> Except in a very clear case, the court will not interfere with the findings of the Industrial Commission that a workman has been restored to health and been fully compensated for his injury. *Oldenberg v. Industrial Commission* (1915) 159 Wis. 333, 150 N. W. 444.

The court cannot say that a finding of total disability was not warranted where the evidence was not before the court, and a photograph which was annexed to and made a part of the report of the Board showed that the workman had lost the whole of every finger except the forefinger of his right hand, and the little or fourth finger of his left hand. *Septimo's Case* (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.

A finding of total disability at the time of the hearing is not sustained by the evidence where the claimant testified that he had been working for several days, that he intended to return to work upon the day after the hearing, that heavy lifting caused him pain, but did not say that his work involved such lifting, and it appeared as a matter of fact that he was earning more than at the time of the accident. *State ex rel. Duluth Diamond Drilling Co. v. District Ct.* (1915) 129 Minn. 423, 152 N. W. 838.

<sup>54</sup> *Duprey's Case* (1914) 219 Mass. 189, 106 N. E. 686.

<sup>55</sup> In *Russo v. Omaha & C. B. Street R. Co.* (1915) — Neb. —, 153 N. W. 510, it was held that the amount provided for in the act as compensation for damages are arbitrary sums fixed by the legislature, and are not to be taken as a standard of comparison or recovery in an action for injuries suffered before its enactment.

<sup>56</sup> *Hillestad v. Industrial Ins. Commission* L.R.A.1916A.

The amount of the compensation is usually determined by the amount of the average weekly earnings of the injured employee. Under the Massachusetts act, consideration of the average weekly wages of an injured employee is not restricted to the wages earned from the same employer.<sup>57</sup> But the term "average annual earnings," as used in the Michigan act, means his average annual earnings in the employment in which he was employed at the time of his injury, although he was engaged in such employment but a portion of each year, and was engaged in another employment during the remaining part of the year.<sup>58</sup>

The provision in the New Jersey statute that where the rate of wages is fixed by the output of the employee, his average weekly wages shall be taken to be six times his average daily earnings for a working day of ordinary length, excluding overtime, does not apply in a case where the employee is paid by the hour.<sup>59</sup> Under the Michigan statute, the average weekly wages of the employee

(1914) 80 Wash. 426, 141 Pac. 913, 6 N. C. C. A. 763.

<sup>57</sup> The average weekly earnings of a longshoreman who was injured in the employment of one steamship company are to be computed from his wages received from all employers, and not merely from what he received from the steamship company in whose employ he was at the time of his injury, where he, like other longshoremen, worked for many other employers during a day or group of days. *Gillen v. Ocean Acci. & Guarantee Corp.* (1913) 215 Mass. 98, post, 371, 102 N. E. 346.

<sup>58</sup> *Andrejwski v. Wolverine Coal Co.* (1914) 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807. The court said: "To charge this employment with compensation for injuries to its employees, on the same basis as employments which operate during substantially 300 days in the year, would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two thirds of a working year."

<sup>59</sup> *Smolenski v. Eastern Coal Dock Co.* (1915) — N. J. L. —, 93 Atl. 85. The court further said that from the language used it might be inferred, however, that where weekly wages are not fixed, they shall be taken to be six times the daily wage for a working day of average length. In this case it was held that the wages of a workman may be fixed at \$15 a week where he was paid by the hour, and his wages varied from 20 cents to 32 cents an hour, and at the time he was injured he was earning 25 cents an hour, and the average working day was ten hours a day.

must always be determined by dividing his average annual earnings by 52.<sup>60</sup>

The compensation to be allowed to an injured employee is to be based upon the wages which he was receiving at the time of the accident, although those wages were somewhat higher than he had previously been receiving.<sup>61</sup>

A fixed sum given by the employer to the workman to pay the wages of an assistant necessary for him in performance of his work is not a part of the workman's wages.<sup>62</sup> But in fixing the amount of wages which an employee was receiving at the time of his injury, consideration must be given to the value of board furnished to the employee by the employer.<sup>63</sup>

Under the Kansas statute, in determining the amount of weekly payments of compensation, consideration must be given to the amount which the workman was able to earn after the injury.<sup>64</sup> But, in determining the question of probable future earnings, an offer of employment

by the employer pending litigation, which offer was not permanent or for any definite period, is of but little weight.<sup>65</sup>

It has been held that by the express terms of the Wisconsin act a workman disabled from following the occupation in which he was engaged when injured is entitled to compensation as for total incapacity, notwithstanding he may be able to earn wages in another employment.<sup>65a</sup>

The statutes usually provide that an injured workman shall be furnished with proper medical attendance at the expense of the employer, but the latter is entitled to select the physician to attend him. Under the Wisconsin statute, an injured employee cannot employ a physician at the expense of the employer, except for such reasonable length of time as necessarily intervenes between his injury and a reasonable opportunity, after due notice, for the employer to furnish one.<sup>66</sup> But circumstances may exist that will entitle a workman to go to his own physician. Thus, an injured

<sup>60</sup> Andrejwski v. Wolverine Coal Co. (Mich.) supra.

<sup>61</sup> Huyett v. Pennsylvania R. Co. (1911) 86 N. J. L. 683, 92 Atl. 58.

The average weekly earnings of a motorman may be fixed at the amount he was earning at the time he was injured, where, although he had been earning such amount for but one month and two days, and he could not be assured of retaining the particular run more than a period of six months, there was a reasonable certainty of his retaining it, and the wages that he was receiving at the time of the injury were about the customary wages which the employer was paying to motormen who had been in the service of the company as long as the injured workman. *Fredenburg v. Empire United R. Co.* (1915) 168 App. Div. 618, 154 N. Y. Supp. 351.

<sup>62</sup> Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such a sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer. *State ex rel. Gaylord Farmers' Co.-op. Creamery Asso. v. District Ct.* (1915) 128 Minn. 486, 151 N. W. 182.

<sup>63</sup> The amount of wages which a workman was receiving at the time of his injury should be fixed at \$15 where he received \$12 in cash and board from the employer, which was fixed at \$3 per week. *Baur v. Court of Common Pleas* (1915) — N. J. L. —, 95 Atl. 627.  
L.R.A.1916A.

<sup>64</sup> Compensation to be awarded to a plaintiff, who, before the accident, was earning \$12 a week, and after the accident, was able to earn \$3 a week, is 50 per cent of the difference in the earnings before and after the accident,—namely, \$4.50 per week. *Roberts v. Charles Wolff Packing Co.* (1915) 95 Kan. 723, 149 Pac. 413.

<sup>65</sup> *Giachas v. Cable Co.* (1915) 190 Ill. App. 285.

<sup>65a</sup> One who by the loss of a thumb and finger on one hand is disabled from following the particular calling in which he was engaged is entitled to compensation for total disability regardless of what he may be able to earn in other occupations under a statute providing that the weekly loss of wages on which the compensation of an injured employee shall be computed shall consist of such percentage of the average weekly earnings of the injured employee as shall fairly represent the proportionate extent of the impairment of his earning capacity "in the employment in which he was working at the time of the accident." *Mellen Lumber Company v. Industrial Commission of Wis. et al.* — Wis. —, 142 N. W. 187.

<sup>66</sup> Competency of an injured employee to procure medical and surgical treatment, or for such to be procured in his behalf at the expense of the employer, under the workmen's compensation act, exists for the reasonable time after the injury required to afford the employer an opportunity to exercise his privilege; it is then suspended if the employer exercises such privilege, but revives and relates back to the time of suspension, if necessary, if the employer unreasonably neglects or refuses to exercise such privilege. *Milwaukee v. Miller* (1913) 154 Wis. 652, ante, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.



employee is justified in going to his family physician for treatment where he is dissatisfied with the advice given him by the surgeon first selected by the insurance company, and, after being directed to go to another surgeon, finds the surgeon thus suggested to be out of town.<sup>67</sup> And although a workman is not permitted generally to select his own physician or hospital, but is required to accept that which is provided for him by the employer, yet in the case of an illiterate foreigner, unable to read, write, or understand the English language, who was not informed as to what he should do in case of injury, the employer will be required to pay the physician to whom he went for necessary services rendered to him.<sup>68</sup>

The burden of proof to establish to a reasonable certainty the reasonableness of charges for medical and surgical treatment procured by the employee himself is on the employee.<sup>69</sup>

The Kansas act contemplates no allowance on account of medical attendance except where a workman dies as a result of his injuries, leaving no dependents.<sup>70</sup> A similar rule prevailed in New Jersey prior to the amendment of 1914.<sup>71</sup>

Expenses for services of a nurse, as such, are not allowable against the employer for the period of ninety days

after the injury, or at all during such period, except as a part of reasonably necessary medical and surgical treatment, proved to be such by the physician and surgeon in attendance; and expenses for services of a nurse as such, after the first ninety days, are not chargeable to the employer, nor at all thereafter, except by allowance of a maximum percentage or disability indemnity.<sup>72</sup>

The supreme court cannot, under § 20 of the Washington act, allow a fee to an attorney or increase the allowance of the superior court.<sup>73</sup> The Minnesota statute contains no provision for an allowance for attorney's fees, but the court may allow the statutory costs and actual disbursements, although they are designated in the order as attorney's fees.<sup>74</sup>

Means whereby payments of future compensation may be commuted by the payment of a lump or gross sum is usually provided in the statutes. The question whether or not the weekly payments shall be so commuted rests in the discretion of the trial court or of the Commission.<sup>75</sup> The Kansas statute gives precisely the same power to the trial court in respect to awarding a lump sum or periodical payments, in cases insti-

<sup>67</sup> Massachusetts Bonding & Ins. Co. v. Pillsbury (1915) — Cal. —, 151 Pac. 419.  
<sup>68</sup> Panasuk's Case (1914) 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688.

<sup>69</sup> In Milwaukee v. Miller (Wis.) supra, the court held that it would not allow a bill of a physician for over one hundred and thirty visits for an injury to a great toe, even of such a severe nature as to require amputation and careful attention for some days to eradicate or prevent infection, and to create proper conditions for recovery.

<sup>70</sup> Cain v. National Zinc Co. (1915) — Kan. —, 148 Pac. 251.

<sup>71</sup> Central R. Co. v. Kellett (1914) 86 N. J. L. 84, 90 Atl. 1005, 5 N. C. C. A. 529; Taylor v. Seabrook (1915) — N. J. L. —, 94 Atl. 399; Hammill v. Pennsylvania R. Co. (1915) — N. J. L. —, 94 Atl. 313.

<sup>72</sup> Milwaukee v. Miller (1913) 154 Wis. 652, ante, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

<sup>73</sup> Boyd v. Pratt (1915) 72 Wash. 306, 130 Pac. 371.

<sup>74</sup> State ex rel. Duluth Diamond Drilling Co. v. District Ct. (1915) 129 Minn. 423, 152 N. W. 838.

<sup>75</sup> On the loss of a first phalange of the index finger the case should be treated as one in which payments were to be made in the future, to be commuted in the sound discretion of the court if it thought that was in the interest of justice. James A. Banister Co. v. Kriger (1913) — N. J. L. —, 89 Atl. 923. This decision was on a I. R.A. 1916A.

rehearing of a former case, 84 N. J. L. 30, 85 Atl. 1027.

A judgment for an award for permanent disability may be for a lump sum or for periodical payments, in the discretion of the trial court. Cain v. National Zinc Co. (1915) 94 Kan. 679, 146 Pac. 1165.

In Gorrell v. Battelle (1914) 93 Kan. 370, 144 Pac. 244, the court in a headnote summed up the facts and findings of the case as follows: "In this case the injured workman, who was a mechanic, lost his right eye, and his left eye became weakened as the result of an injury. The consequence was, his capacity to use tools was diminished, and he was reduced to an economic status lower than he had previously occupied. There was no direct proof that he could ever retrieve his former capacity. The court examined him at some length and so had an opportunity to form an estimate of his personality as a matter affecting his probable future earning capacity. Held, that an award of compensation for partial incapacity, for the maximum period allowed by the workmen's compensation act, and in a lump sum, will not be disturbed."

While an employer may be allowed redemption from liability under an award of compensation in the form of periodical payments, by paying 80 per cent of the amount of payments that will become due, and while an employee who has been awarded compensation in periodical payments by

tuted by a person dependent on a workman whose death results from an injury, as it does in case of an injured workman.<sup>76</sup>

Under the New Jersey act, it is necessary for the trial judge, before awarding a lump sum, to determine what sum should be paid periodically; and he should also state the method by which he reached his result, and the reasons that induced him to commute the periodical payments into a lump sum.<sup>77</sup>

Where the fact that compensation was owed by the employer to the dependents of the deceased employee, and the amount of compensation, were conceded, it is not necessary to institute proceedings for arbitration before commencing a proceeding for the commutation of the compensation to a lump sum under § 5½ of the act.<sup>78</sup>

The amount of the lump sum to be paid

agreement or arbitration may ask for and obtain judgment against the employer for 80 per cent of the sum of the payments due and to become due in cases where there is doubt as to the security of compensation, these provisions have no application in an action for compensation, where the court, in the exercise of its discretion, enters judgment for a lump sum in the first instance. *Roberts v. Charles Wolff Packing Co.* (1915) 95 Kan. 723, 149 Pac. 413 (headnote by the court).

<sup>76</sup> *McCracken v. Missouri Valley Bridge & Iron Co.* (1915) — Kan. —, 150 Pac. 832. The Supreme Court held that the trial court did not abuse its discretion in granting the compensation to the mother of a deceased workman in a lump sum, where she was entirely dependent upon her son's earnings for her own continued existence, was utterly destitute, with no income of her own, and was physically unable to earn her own living, being sixty-two years old. <sup>77</sup> *Mockett v. Ashton* (1913) 84 N. J. L. 452, 90 Atl. 127.

The determination of the trial judge required by paragraph 20 of the New Jersey act should set forth in cases where weekly payments are commuted to a lump sum, the basis of award in amount for a week and number of weeks; the commuted amount being expressly predicated on such finding. *Long v. Bergen County Ct. of Common Pleas* (1913) 84 N. J. L. 117, 86 Atl. 529.

A direction of the common pleas that the weekly payments be commuted to a lump sum pursuant to ¶ 21 of the act should be based on specific findings of fact, supported by legal evidence. *New York Shipbuilding Co. v. Buchanan* (1913) 84 N. J. L. 543, 87 Atl. 86.

<sup>78</sup> The proceedings for bringing parties into court, under § 5½ of the act, relating to the commutation of compensation to a lump sum, are regulated by the act itself, and resort need not be had to the general L.R.A.1916A.

in commutation of the weekly payments is the present value of such payments.<sup>79</sup> The amount to be awarded under § 2 of the New Jersey act to the employee is not to vary according to his age or the character of his work or his expectation of life; the only variance between the cases of different employees is that caused by difference in wages earned.<sup>80</sup>

Where the statute fixes the number of weeks that the payment for various specified injuries shall continue, it is, of course, error to award compensation for a longer time.<sup>81</sup> The number of weeks specified in the statute is not to be reduced by the first two weeks after the accident, during which no compensation is to be paid.<sup>82</sup> Where the employee suffers a loss other than those losses for which provision is specifically made, the amount payable as compensation is to bear the same relation to the amount

practice act. *Staley v. Illinois C. R. Co.* (1914) 186 Ill. App. 593.

<sup>79</sup> The lump sum to which the compensation is to be commuted under § 5½ of the Illinois act of 1911 is the present value of the full sum of compensation which was to be paid in instalments. (Ill.) *Ibid.*

In commuting the periodical payments to a lump sum, the trial judge should make the lump sum equal to the present value of the periodical payments; and it is error to multiply the weekly payment by the number of weeks, and make the necessary credits. *James A. Banister Co. v. Kriger* (1913) 84 N. J. L. 30, 85 Atl. 1027, rehearing denied in — N. J. L. —, 89 Atl. 923.

In awarding a lump sum, it is error not to make allowance for the difference in value between the lump sum to be presently paid and the value of the weekly payments to be made thereafter. *Baur v. Court of Common Pleas* (1915) — N. J. L. —, 95 Atl. 627.

<sup>80</sup> *Bateman Mfg. Co. v. Smith* (1913) 85 N. J. L. 409, 89 Atl. 979, 4 N. C. C. A. 588.

<sup>81</sup> An award of compensation for a total of 450 weeks is erroneous, since the statute provides that in no case shall the total number of weekly payments be more than 400, and this error is not rendered harmless by the reservation of right to a modification in case of an earlier termination of a temporary disability. *Birmingham v. Lehigh & W. Coal Co.* (1915) — N. J. L. —, 95 Atl. 242.

<sup>82</sup> The provisions in ¶ 13, that no compensation shall be allowed for the first two weeks after the injury, except for medical and hospital services, does not have the effect of reducing from thirty-five weeks to thirty-three weeks the period for which compensation is to be paid to an employee who had lost the first finger, or a phalange thereof. *James A. Banister Co. v. Kriger* (N. J.) supra.



stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule, but the payment period is for the full time stated in the schedule.<sup>83</sup>

An injured workman is entitled to the minimum compensation of \$5 a week provided for in the New Jersey statute, regardless of the character of the injury.<sup>84</sup>

<sup>83</sup> Where an employee suffers an injury to an arm, resulting in the loss of thirty per cent of the use thereof, he is entitled to 30 per cent of the compensation he would have been entitled to for the total loss of the arm for the whole period of 200 weeks provided for in the statute; and if the amount per week does not amount to \$5, then the minimum provision of the statute applies, and he is entitled to such minimum amount of \$5. *De Zeng Standard Co. v. Pressey* (1914) 86 N. J. L. 469, 92 Atl. 278. The court said that it was erroneous to award him full compensation for thirty per cent of the time, but, as the employee did not complain, the master could not.

An award for a partial injury to the motion of an arm of the same compensation as the statute fixes for the loss of the arm is not in compliance with the statutory mandate that the compensation shall bear such relation to the amount stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule. *Barbour Flax Spinning Co. v. Hagerty* (1913) 85 N. J. L. 407, 89 Atl. 919, 4 N. C. C. A. 586.

Where the statutory allowance is of 400 weeks' pay for total disability, an allowance for 340 weeks' pay for injuries consisting of a fracture of the skull, paralysis of the right side of the mouth, and injuries to the nostrils, eye, and ear, together with the impairment of the use of the right arm, is improper where it appeared that the injuries did not approach total disability. *O'Connell v. Simms Magneto Co.* (1913) 85 N. J. L. 64, 89 Atl. 922, 4 N. C. C. A. 590.

An award of 75 per cent on what the statute fixes for an arm in the case where a workman's forearm and hand were injured to the extent of 75 per cent, and his upper arm to the extent of 8 per cent, is not necessarily incongruous with the statutory provision making amputation between the elbow and the wrist equivalent to the loss of a hand only. *Blackford v. Green* (1915) — N. J. L. —, 94 Atl. 401. The court said that it is conceivable that a maimed forearm may impair the efficiency of the whole more than the amputation between the wrist and the elbow.

A workman who has lost 80 per cent of the usefulness of both of his eyes is entitled under clause b of the New Jersey act to 80 per cent of the compensation for the total loss of both eyes, which amounts to compensation for 320 weeks. *Vishney v. L.R.A.* 1916A.

An award of compensation may be made to take effect as of the date antecedent to the date of application.<sup>85</sup>

An employer is entitled, upon an award of compensation being made against him, to credit for any payments which he may have made to the workman in the way of compensation;<sup>86</sup> he is also entitled to credit for any amount which he has paid out an account of medical or hos-

*Empire Steel & I. Co.* (1915) — N. J. L. —, 95 Atl. 143.

<sup>84</sup> The minimum compensation of \$5 per week, provided for in ¶ 11, clause a, of the New Jersey Laws 1911, chapter 95, applies in the case of an employee who had lost the phalange of a finger, although clause c provides that the loss of the first phalange of any finger shall be considered to be equal to the loss of one half of the finger, and the compensation shall be one half of the amount justified for a finger, and \$5 is all that would be awarded had the employee lost his entire finger. *James A. Banister Co. v. Kriger* (1913) 84 N. J. L. 30, 85 Atl. 1027, rehearing denied in — N. J. L. —, 89 Atl. 1027.

An award of the minimum compensation of \$5 a week for a period of 30 weeks is proper where a servant suffers a total temporary injury to a finger which would entitle him to an award of \$7.50 a week, or 50 per cent of his wages for a period of six weeks, and also suffers a permanent injury to the middle finger equal to the loss of one half of the phalange of that finger, for which the proper award would be one half of one fourth of his wages. *Maziarski v. George A. Ohl & Co.* (1914) 86 N. J. L. 692, 93 Atl. 110, following *James A. Banister Co. v. Kriger* (1913) — N. J. L. —, 89 Atl. 923.

In *Barbour Flax Spinning Co. v. Hagerty* (1913) 85 N. J. L. 407, 89 Atl. 919, 4 N. C. C. A. 586, where there was an award for a partial injury to the motion of the arm of the same compensation as the statute fixed for the loss of an arm, the court said: "The petitioner seeks to justify this allowance on the authority of *James A. Banister Co. v. Kriger* (1913) 84 N. J. L. 30, 85 Atl. 1027. That case, however, arose under a different provision of the act; the number of weeks for which the allowance was to be made was fixed by the statute. It was only the amount that was subject to variation, and variation was prevented by the clause fixing a minimum of \$5 per week. The legislature seems to have thought our construction too liberal to the employee, for it amended the act in 1913, immediately after our decision. Pamph. L. pp. 302, 304."

<sup>85</sup> *Hunnewell's Case* (1915) 220 Mass. 351, 107 N. E. 934.

<sup>86</sup> In *Barbour Flax Spinning Co. v. Hagerty* (1914) 85 N. J. L. 407, 89 Atl. 919, 4 N. C. C. A. 586, where the case shows that the amount allowed by the statute was paid during fifty-two weeks, and that no

pital bills for the injured employee.<sup>87</sup> But payments made in excess of the amount of compensation due the workman will not be credited against future compensation.<sup>88</sup> So, under the New Jersey statute, the period of time during which a master re-employed the servant after an injury, at the same wages as before the accident, is not to be deducted from an award for total disability.<sup>89</sup>

#### *XL. Insurance funds.*

Under the statutes providing compensation by means of an industrial insurance fund, the questions sometimes arise as to the manner in which the fund shall be collected and handled.

Under § 17 of the Washington act, with reference to the application of the act where the state, county, or municipal corporation shall engage in any extra-hazardous work, the city is authorized to withhold from a contractor the amount which he is obligated to pay into the accident fund.<sup>90</sup> But claims for premiums or contributions to the state insurance fund are not entitled to priority over a debt secured by a mortgage to a private person.<sup>91</sup>

The right of the state to collect premiums for the insurance fund from employers under contract with municipalities is not waived by a failure to make a preliminary collection upon the pay roll of the employer "of the last pre-

ceding three months of operation" prior to the taking effect of the law, and waiting before attempting to collect until the employer's contracts were completed, and then calculating the percentages upon the actual pay rolls during the period for which the contractors were liable.<sup>92</sup>

Work done on the construction of a tunnel should be classified as tunnel construction work, although the tunnel is for a railroad and the schedule provides for a classification of "steam railroad construction work," for which a different rate of premium is required.<sup>93</sup>

The industrial insurance fund of Nevada, although required by the compensation law (Laws of 1913, chap. 111) to be paid to the state treasurer, is not a part of the "state treasury," so as to require claims against the fund to be presented to the board of examiners to be passed on by the board, and the issuance of warrants by the comptroller.<sup>94</sup>

Premiums on an insurance policy issued in accordance with the workmen's compensation law (Laws 1910, chap. 674) may be recovered although the law was subsequently declared unconstitutional, where the decision was handed down after the expiration of the term of the policy.<sup>95</sup>

An employer who carries his own insurance obtains no immunity from liability which would ascertain to a stock corporation or mutual association, had

credit was given by the trial court for this payment, and the petition averred that it was received from the insurance company of the defendant, and the admission was made at the trial that it was paid by the defendant, the court said: "If that is true, or if the premium for the insurance had been paid by the defendant, credit should have been given. If, however, the payment was by virtue of insurance paid for by the petitioner, the defendant is entitled to no credit therefor."

<sup>87</sup> *Cain v. National Zinc Co.* (1915) — *Kan.* —, 148 Pac. 251.

<sup>88</sup> An employer who pays to an injured employee for a number of weeks after the injury a weekly sum in excess of the compensation legally payable is, upon a proceeding for the recovery of compensation, to be credited with the payment of the legal compensation for the number of weeks in which the payment had been made, less two, since the trial judge was justified in finding that the payments made during the first two weeks, when there was no liability to make compensation, were not made on account of the statutory compensation, and the presumption was that the excess was paid to the workman for labor L.R.A.1916A.

performed, or in a spirit of benevolence. *Blackford v. Green* (1915) — *N. J. L.* —, 94 Atl. 401.

<sup>89</sup> *De Zeng Standard Co. v. Pressey* (1914) 86 *N. J. L.* 469, 92 *Atl.* 278.

<sup>90</sup> *State ex rel. Pratt v. Seattle* (1913) 73 *Wash.* 396, 132 *Pac.* 45. The court said it was true that the method by which the collection was to be made was not prescribed by the statute, but that the city was authorized to collect it by withholding it from the amount due to the contractors.

<sup>91</sup> *Mississippi Valley Trust Co. v. Oregon-Washington Timber Co.* (1914) 213 *Fed.* 988.

<sup>92</sup> *State ex rel. Pratt v. Seattle* (*Wash.*) *supra*. The court said that while possibly the more regular way would have been to make the preliminary collection, nevertheless the method pursued by the state could work no hardship upon the employers, and they therefore could not complain.

<sup>93</sup> *State v. Chicago, M. & P. S. R. Co.* (1914) 80 *Wash.* 435, 141 *Pac.* 897.

<sup>94</sup> *State ex rel. Beebe v. McMillan* (1913) 36 *Nev.* 383, 136 *Pac.* 108.

<sup>95</sup> *New Amsterdam Casualty Co. v. Olcott* (1915) 165 *App. Div.* 603, 150 *N. Y. Supp.* 772.



it instead of the employer been the carrier of the insurance.<sup>96</sup>

### *XXI. Appeal and review.*

#### Findings of fact by the Commission

<sup>96</sup> *Kenny v. Union R. Co.* (1915) 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986.

<sup>97</sup> *Diaz's Case* (1914) 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609; *Donovan's Case* (1914) 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549; *Bentley's Case* (1914) 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; *Herrick's Case* (1914) 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554; *James's Case* (1914) 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552; *Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; *Plass v. Central New England R. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 854; *Powley v. Vivian & Co.* (1915) 169 App. Div. 170, 154 N. Y. Supp. 426.

Under its supervisory power over the Public Service Commission respecting its administration of the workmen's compensation act, the West Virginia supreme court takes cognizance of the questions of law only. *Poccardi v. Public Service Commission* (1915) — W. Va. —, post, 299, 84 S. E. 242, 8 N. C. C. A. 1065.

The superior court cannot retry the facts, and an appeal to that court from the findings and award made by a commissioner under the act is not a trial de novo. *Hotel Bond Co.'s Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

The findings of fact as to the petitioner's incapacity, made by the superior court, are conclusive on appeal. *Weber v. American Silk Spinning Co.* (1915) — R. I. —, 95 Atl. 603.

<sup>98</sup> *Burns's Case* (1914) 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *Nickerson's Case* (1914) 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645; *Buckley's Case* (1914) 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613; *Meley's Case* (1914) 219 Mass. 136, 106 N. E. 559; *Septimo's Case* (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906; *Rayner v. Sligh Furniture Co.* (1914) 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851; *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Spooner v. Detroit Saturday Night Co.* (1915) — Mich. —, ante, 17, 153 N. W. 657; *Redfield v. Michigan Workmen's Compensation Mut. Ins. Co.* (1915) 183 Mich. 633, 150 N. W. 362, 8 N. C. C. A. 889; *Goldstein v. Center Iron Works* (1915) 167 App. Div. 526, 153 N. Y. Supp. 224; *Hoenig v. Industrial Commission* (1915) 159 Wis. 646, post, 339, 150 N. W. 996, 8 N. C. C. A. 192; *International Harvester Co. v. Industrial Commission* (1914) 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822; *Eagle Chemical Co. v. Nowak* (1915) — Wis. —, 154 N. W. 636; *First Nat. Bank v. Industrial Commission* (1915) — Wis. —, 154 N. W. 847; *Fairchild v. Pennsylvania R. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 751.

When a judgment of the court of common L.R.A.1916A.

or trial court are conclusive,<sup>97</sup> and will not be disturbed by the appellate court if there is any evidence to support them,<sup>98</sup> although the court in trying the facts might have reached a different con-

pleas awarding compensation in case of death is removed to the supreme court by certiorari, the supreme court accepts the finding of the common pleas court upon the facts, if there be any legal evidence to warrant them. *Sexton v. Newark Dist. Teleg. Co.* (1913) 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, affirmed 86 N. J. L. 701, 91 Atl. 1070; *Bryant v. Fissell* (1913) 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Where the employer and employee assent, whether expressly or by implication of the statute, to the workmen's compensation act, they assent to the whole scheme of the act, a part of which is that the decision of the trial judge as to all questions of fact shall be conclusive and binding, and that the supreme court will not review his finding as to the duration of liability where the evidence permits it. *Scott v. Payne Bros.* (1913) 85 N. J. L. 446, 89 Atl. 927, 4 N. C. N. C. 682.

If, in any reasonable view of the evidence, it will support, either directly or by fair inference, the findings made by the Commission, then such findings are conclusive upon the court. *Milwaukee v. Industrial Commission* (1915) 160 Wis. 238, 151 N. W. 247. The court said: "It is not the scheme of the act to make the court a reviewer of facts. Its office is to relieve against fraud, to keep the Commission within its jurisdictional bounds, and to correct an award not supported by the facts found."

The finding that an employee had lead poisoning must stand, if there was some testimony to support it. *Re Doherty* (1915) — Mass. —, 109 N. E. 887.

The finding by a committee on arbitration affirmed by the Industrial Accident Board, that the accident occurred while the employee was in the employment of the defendant, is conclusive where there is some evidence to support it. *Grove v. Michigan Paper Co.* (1915) — Mich. —, 151 N. W. 554.

Where there is evidence to support the finding of the Industrial Accident Board that the injury did not arise by reason of the intentional and wilful misconduct of the employee, such finding is conclusive on the court on certiorari. *Rayner v. Sligh Furniture Co.* (1914) 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851.

The Minnesota supreme court cannot interfere with a finding of the district court that an employee was not intoxicated at the time of his death, where there was evidence tending to support such finding. *State ex rel. Nelson-Spelliscy Implement Co. v. District Ct.* (1914) 128 Minn. 221, 150 N. W. 623.

The question of dependency of the claimant for the death of an employee is settled by the findings of the commissioner in the absence of anything to indicate error of law in making the findings, or drawing conclu-

elusion.<sup>99</sup> The finding of the Industrial Accident Board stands upon the same footing as the verdict of a jury or a finding of the court, and will not be set aside unless wholly unsupported by the evidence;<sup>1</sup> in the absence of conflict in the evidence that goes to show a claimant's right to participation in the workmen's compensation fund, the Commission is regarded in the supreme court as a demurrant to the evidence, and if the evidence would sustain a verdict of the jury in favor of the claimant, the claim is regarded as sufficiently proved.<sup>2</sup> So,

sions from them. *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, post, 436, 94 Atl. 372.

An award of compensation as for the loss of the use of the hand will not be interfered with where it was made by consent of the attorney representing the appellant. *Cunningham v. Buffalo Copper & Brass Rolling Mills* (1915) — App. Div. —, 155 N. Y. Supp. 797.

The findings of the Commission upon the question whether or not the accident was one arising out of and in the course of the employment is conclusive upon the fact if there is some evidence to support them. *Kingsley v. Donovan* (1915) — App. Div. —, 155 N. Y. Supp. 801.

<sup>99</sup> *Milwaukee Coke & Gas Co. v. Industrial Commission* (1915) 160 Wis. 247, 151 N. W. 245.

<sup>1</sup> *Pigeon's Case* (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; *Re McPhee* (1915) — Mass. —, 109 N. E. 633; *Re Savage* (1915) — Mass. —, 110 N. E. 283.

<sup>2</sup> *Poccardi v. Public Service Commission* (1915) — W. Va. —, post, 299, 84 S. E. 242, 8 N. C. C. A. 1065.

<sup>3</sup> An order of the court of common pleas based upon disputed questions of fact will not be set aside. *Jackson v. Erie R. Co.* (1914) 86 N. J. L. 550, 91 Atl. 1035, 6 N. C. C. A. 944.

The disposition by the Commission of questions of fact on which the evidence was conflicting is final and conclusive upon the court upon a review on certiorari. *Western Indemnity Co. v. Pillsbury* (1915) — Cal. —, 151 Pac. 398.

<sup>4</sup> *International Harvester Co. v. Industrial Commission* (1914) 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

An award of compensation made without proof that the injury was caused "by accident arising out of and in the course of the employment" must be annulled when attacked on certiorari. *Englebreton v. Industrial Acci. Commission* (1915) — Cal. —, 151 Pac. 421.

Upon a rescript of the record to the Industrial Accident Board for correction and amplification, the Board has no power to make a new finding. *Re Doherty* (1915) — Mass. —, 109 N. E. 887.

The supreme judicial court will, where all the material evidence is reported, take cog-

findings based on disputed questions of fact or conflicting evidence cannot be set aside.<sup>3</sup>

But a Commission or trial court cannot make an award not supported by any evidence;<sup>4</sup> nor can it base an award on mere conjecture or surmise;<sup>5</sup> nor, according to the weight of authority, can it base an award on hearsay evidence only.<sup>6</sup> The hearsay rule of evidence is not a "technical" rule of evidence, within the meaning of § 77 of the California act, which provides that the Commission shall not be bound by the technical

nizance of the contention that the finding of the majority of the committee of arbitration as affirmed by the Industrial Accident Board, and in turn by the superior court, is not supported by the evidence reported. *Fisher's Case* (1915) 220 Mass. 581, 108 N. E. 361.

If the record discloses that a finding of fact is entirely without legal evidence tending to support it, such finding amounts to an error of law, and will be reviewed by the court upon appeal and set aside. *Jillson v. Ross* (1915) — R. I. —, 94 Atl. 717.

<sup>5</sup> Facts found by the Industrial Accident Board, to be conclusive, must be based on competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence. *Reck v. Whittlesberger* (1914) 181 Mich. 463, 148 N. W. 247.

<sup>6</sup> An award based merely on hearsay evidence cannot be sustained. *Employers' Assur. Corp. v. Industrial Acci. Commission* (1915) — Cal. —, 151 Pac. 423.

Hearsay evidence cannot be made the basis of a finding of fact. *Reck v. Whittlesberger* (Mich.) supra. The court said that, while it is the intent of the compensation act to adjust controversy by concise and summary proceedings, unhampered by technical form, yet the elementary and fundamental principles of a judicial trial must be observed, and it is not the intent of the act to throw aside all safeguards by which judicial investigations are recognized as best protected.

Although the Industrial Accident Board is not a court in the strict meaning of the word, and its members are not judicial officers within the Constitution, nevertheless such board may be considered a court within the meaning of Revised Laws, chap. 175, § 66, which provides that "a declaration of a deceased person shall not be inadmissible in evidence as hearsay, if the court finds that it was made in good faith before the commencement of the action, and upon the personal knowledge of the declarant." *Pigeon's Case* (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516. The court further held that the word "action," as used in the latter part of the statute quoted above, would be construed to embrace proceedings under the compensation act.



rules of evidence.<sup>7</sup> But the decisions of the Commission or trial court need not in all cases be reversed under the rule of presumptive prejudice because of error in the admission of incompetent or hearsay testimony, if there appears in the record a legal basis for the finding.<sup>8</sup>

It has been held, however, that under the New York act the Commission is authorized to receive hearsay evidence, and to base its findings upon it.<sup>9</sup>

Where the evidence is not reported it cannot be found as a matter of law that

findings are not warranted.<sup>10</sup> Consequently, it is the duty of the tribunal trying the facts to report the evidence upon which the findings are based.<sup>11</sup> A general finding that the petitioner was permanently injured, without stating the nature of the injury, is insufficient.<sup>12</sup>

Neither party is, as a matter of right, entitled to a rehearing upon questions of fact.<sup>13</sup>

In the absence of fraud, matters not raised below cannot be heard on ap-

<sup>7</sup> The California courts will merely annul an award which was made on hearsay evidence only, leaving the Commission to proceed with a further hearing, where it appears that competent evidence of the facts might be produced. *Englebreton v. Industrial Acci. Commission* (1915) — Cal. —, 151 Pac. 421.

<sup>8</sup> The unrestricted admission of hearsay testimony by the Industrial Accident Board is not reversible error where there appears in the record a legal basis for its findings, which are made conclusive by the statute when said Board acts within the scope of its authority. *Fitzgerald v. Lozier Motor Co.* (1915) — Mich. —, 154 N. W. 67.

The decisions of the Industrial Accident Board are not in all cases to be reversed under the rule of presumptive prejudice merely because of the error in the admission of incompetent testimony, when, in the absence of fraud, there appears in the record a legal basis for its findings, which are made conclusive by the statute. *Reck v. Whittlesberger* (1914) 181 Mich. 463, 148 N. W. 247.

A decree will not be reversed for error on questions of evidence, unless substantial rights of the parties appear to have been affected. *Pigeon's Case* (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1015A, 737.

The admission of incompetent evidence will not operate to reverse the award, if there be any basis in the competent evidence to support it. *First Nat. Bank v. Industrial Commission* (1915) — Wis. —, 154 N. W. 846.

The Industrial Commission, acting as an administrative board, is not held to the same strict rule with respect to ruling on the admission of evidence as courts of law. (Wis.) Ibid.

<sup>9</sup> *Carroll v. Knickerbocker Ice Co.* (1915) — App. Div. —, 155 N. Y. Supp. 1. The court said: "Subdivision 2 of § 67 also provides that the Commission shall adopt rules providing the 'nature' of the evidence to be accepted by it. As to proceedings before the Commission, these two sections wholly abrogate the substantive law of evidence,—abrogate the common law, the statute law, the rules of procedure formulated by the courts, and all the technicalities respected by the legal profession. The Commission is authorized by this section, it seems, to make its investigation in any manner that it chooses, wholly unfettered L.R.A.1916A.

by any law previously invented by man. This is the spirit of the statute. The Commission is to be bound neither by custom nor by precedent. The trials before the Commission are to be summary, speedy, and informal. The very instant that the old rules of evidence are invoked, the informal character of the hearing disappears, and the rigid formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the Commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law."

<sup>10</sup> *Bentley's Case* (1914) 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; *Young v. Duncan* (1914) 218 Mass. 346, 106 N. E. 1; *Septimo's Case* (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.

<sup>11</sup> It will not be presumed that, in the absence of an express statement, the Industrial Accident Board reported all the evidence before it; but it will be presumed that the committee on arbitration did so, since the statute imposes upon such committee the positive duty so to do. *Brightman's Case* (1914) 220 Mass. 17, post, 321, 107 N. E. 527, 8 N. C. C. A. 102.

Where the Industrial Accident Board recites in its decision that it "heard the parties," and also that it "affirms and adopts the findings of the committee of arbitration," and the report of the committee of arbitration states that "the material testimony was substantially as follows," following with the testimony of certain witnesses including that of the employee, the supreme court cannot assume that all the evidence upon which the Industrial Accident Board made its findings and decisions was before it, in the absence of any statement on the record to that effect; consequently, it cannot interfere with the findings of the Board. *Stickley's Case* (1914) 219 Mass. 513, 107 N. E. 350.

<sup>12</sup> In cases arising under § 2 of the New Jersey act, the statement of fact as determined by the trial judge, required by paragraph 20, should be specific as to the nature and extent of the injury, so that the reviewing court may be enabled to judge of the propriety of the award as supported by the facts found. *Long v. Bergen County Ct.* (1913) 84 N. J. L. 117, 86 Atl. 529.

<sup>13</sup> Notwithstanding the provision of the statute that no party shall, as a matter of right, be entitled to a second hearing upon

peal.<sup>14</sup> So, upon an application for a rehearing before the Industrial Accident Commission, any point not made in the application for rehearing, or not set forth specifically and in full detail, must be held to be waived.<sup>15</sup>

While it is conceded that the power of the appellate court is limited to questions of law, there is frequently a dispute as to what constitutes a question of law such as may be reviewed by the court. It has been held that under the law the court can reverse an award on the ground of the insufficiency of evidence only when there is no evidence before the Commission tending to support it;<sup>16</sup> and that a provision in the act for appeal to the supreme court upon questions of law does not refer to the question of the sufficiency of evidence in the sense of the weight and preponderance of the evidence.<sup>17</sup> But under the Massachusetts statute, it has been held that where all the evidence is reported, the sufficiency of such evidence to support the finding of the Industrial Accident Board is a question of law, and is reviewable by the supreme court.<sup>18</sup>

any question of fact, a rehearing was granted in a case where the Industrial Accident Board or the Arbitration Commission may have misconceived its power to draw inferences from matters, or base conclusions upon information, outside the evidence, or for some other reason the employee may have failed to present his real case. *Re Doherty* (1915) — **Mass.** —, 109 N. E. 887.

<sup>14</sup>In order that questions as to the admissibility of evidence before the Industrial Accident Board may be considered by the Massachusetts supreme court of appeals, objections must be made before the Board. *Duprey's Case* (1914) 219 **Mass.** 189, 106 N. E. 686.

Affidavits as to the previous condition of the health of the applicant cannot be considered by the court, where they have not been filed in the proceedings in any manner or at any stage thereof. *Poccardi v. Public Service Commission* (1915) — **W. Va.** —, post, 299, 84 S. E. 242.

In an action under the Wisconsin act, evidence cannot be offered in an appeal to the district court except upon the question of fraud. *International Harvester Co. v. Industrial Commission* (1914) 157 **Wis.** 167, 147 N. W. 53, 5 N. C. C. A. 822.

The California supreme court cannot review the proceedings of the Industrial Accident Commission of the state of California on the ground that the findings of the Commission are not sustained by the evidence, and that the applicant has discovered new evidence material to him. *Cardoza v. Pillsbury* (1915) — **Cal.** —, 145 Pac. 1015. The court stated that the grounds alleged were ones upon which the Commission itself could grant a rehearing under § 82, but L.R.A.1916A.

Under the New York act, appeals from the decisions of the appellate division of the supreme court to the court of appeals are subject to the same limitations as are provided for in other civil actions; and consequently there can be no appeal to the higher court from a unanimous decision of the appellate division, where the latter court or a judge of the court of appeals does not expressly allow such an appeal.<sup>19</sup>

Under the New York act an employer who is insured in the state insurance fund cannot appeal from a decision of the Commission awarding compensation to one of his injured employees.<sup>19a</sup>

Questions as to the jurisdiction of the trial court or Commission are questions of law.<sup>20</sup> It has been held by the Connecticut court that it cannot, upon appeal from the compensation commissioner, retry the facts, but it can inquire into them merely to determine whether the award is unauthorized at law, irregular, or informal, or based upon a misconception of the law or of the powers or duties of the commissioner, or is

that the courts are restricted to the grounds stated in § 84 of the act.

<sup>15</sup>*Pacific Coast Casualty Co. v. Pillsbury* (1915) — **Cal.** —, 151 Pac. 658.

<sup>16</sup>*Heileman Brewing Co. v. Schultz* (1915) — **Wis.** —, 152 N. W. 446.

<sup>17</sup>*Jillson v. Ross* (1915) — **R. I.** —, 94 Atl. 717.

<sup>18</sup>*Buckley's Case* (1914) 218 **Mass.** 354, 105 N. E. 979, 5 N. C. C. A. 613.

<sup>19</sup>*Hartnett v. Thomas J. Steen Co.* (1915) — **N. Y.** —, 110 N. E. 170.

<sup>19a</sup>*Crockett v. State Insurance Fund* (1915) — App. Div. —, 155 N. Y. Supp. 692. The court said: "It is true that the employer has a remote interest even though insured in the state fund to the end that the risk which he claims not to be within the act may be so decided as affecting any subsequent premium which he must pay. That interest, however, is too remote an interest to authorize his appeal in a matter where he is not otherwise agreed."

<sup>20</sup>The power of review by the court extends to the inquiry whether a finding of a jurisdictional fact is wholly without the support of any substantial evidence, since such inquiry presents a question of law. *Western Indemnity Co. v. Pillsbury* (1915) — **Cal.** —, 151 Pac. 398.

Certiorari is not a collateral but a direct attack, and under it the existence of the jurisdictional facts may be a subject of inquiry, and to this end the evidence itself may in proper cases be brought up for examination. *Great Western Power Co. v. Pillsbury* (1915) — **Cal.** —, 149 Pac. 35.

The expression "without or in excess of its powers" is the equivalent of the expression "without or in excess of its jurisdiction."



so unreasonable as to justify judicial interference.<sup>21</sup> Under the California and Wisconsin statutes, the award of the Industrial Board or Commission may be set aside "only on the following grounds: (1) That the Board acted without or in excess of its power; (2) that the award was procured by fraud; (3) that the findings of fact by the Board do not support the award."<sup>22</sup>

By the California statute, no appeal is provided to be taken from a decision of the Commission, but a proceeding of review may be taken in either the supreme court or the district court of appeals, which review may extend far enough to determine whether the findings of fact, when such are made, support the order, decision, or award under review.<sup>23</sup>

The constitutional or fundamental powers of the appellate court to review questions of law cannot be limited by provisions contained in the act.<sup>24</sup> The jurisdiction to review acts of the Public Service Commission respecting the administration of the workmen's compen-

sation fund, conferred upon the supreme court of appeals by the act of 1910, is original, and not appellate, since the Commission is not a court, and such jurisdiction pertains only to matters purely judicial, and not to matters administrative or executive.<sup>25</sup>

Under the Massachusetts compensation act which involves merely the question whether or not the injury is within the terms of the act should not be submitted to the jury, but error in so submitting it does not require a reversal if the jury reach the correct conclusion.<sup>26</sup>

Under the Massachusetts act a suit must be brought to the supreme court by appeal from the decree of the superior court, and not by exception.<sup>27</sup> Under the New York act, in order to bring an order of the Commission before the court for review, it is not necessary to file exceptions; the appeal should bring the whole case to be heard on the record of the Commission and the brief and argument submitted by the parties.<sup>28</sup>

A few cases involving the question as

tion," where those words are used in a certiorari action to review the decision of the administrative officer or body. *Milwaukee Western Fuel Co. v. Industrial Commission* (1915) 159 Wis. 635, 150 N. W. 998.

<sup>21</sup> *Kennerson v. Thames Towboat Co.* (1915) — Conn. —, post, 436, 94 Atl. 372.

<sup>22</sup> *Great Western Power Co. v. Pillsbury* (Cal.) supra; *Milwaukee v. Industrial Commission* (1915) 160 Wis. 238, 151 N. W. 247.

<sup>23</sup> *Smith v. Industrial Acci. Commission* (1915) 26 Cal. App. 560, 147 Pac. 601.

<sup>24</sup> The provision in the California act of 1911, that awards or orders of the Industrial Accident Board might be reviewed by a proceeding in the nature of a writ of certiorari in the superior court, the determination of that court to be subject to an appeal to the supreme court, does not take away the constitutional right of the supreme court to issue the writ of certiorari as an exercise of original jurisdiction. *Great Western Power Co. v. Pillsbury* (Cal.) supra.

An award made by the Industrial Commission is subject to review and annulment in the courts, where the finding on any jurisdictional fact is without the support of substantial evidence, and this notwithstanding the provision of the act that the findings of the Commission on questions of fact shall be conclusive and final. *Employers' Assur. Corp. v. Industrial Acci. Commission* (1915) — Cal. —, 151 Pac. 423.

Since the legislature has no power to deprive the parties to a proceeding under the compensation act of having a court review the action of the Board to the extent of determining whether it had acted illegally or without jurisdiction, and since the provision

which attempted to give the supreme court original jurisdiction in such matters was invalid under the state Constitution, the circuit court has jurisdiction to issue the common law writ of certiorari to review the decisions of the Board for the purpose of determining whether it has jurisdiction, or whether it has exceeded its powers and acted illegally. *Courter v. Simpson Constr. Co.* (1914) 264 Ill. 488, 106 N. E. 350, 6 N. C. C. A. 548.

Under the Washington act of the court is not prevented from determining questions of law as to what injuries are within the operation of the statute, by a provision that the decision of the Commission shall be prima facie correct, or by the principle that the rulings of the Commission upon questions of policy, involving the administration of the act, shall be upheld. *Zappala v. Industrial Ins. Commission* (1914) 82 Wash. 314, post, 295, 144 Pac. 54.

<sup>25</sup> *De Constantin v. Public Service Commission* (1914) — W. Va. —, post, 329, 83 S. E. 88; *Poccardi v. Public Service Commission* (1915) — W. Va. —, post, 299, 84 S. E. 242.

<sup>26</sup> *Zappala v. Industrial Ins. Commission* (Wash.) supra.

<sup>27</sup> *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *McNicol's Case* (1913) 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Crippe's Case* (1914) 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828; *Pigeon's Case* (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516.

<sup>28</sup> *Kenny v. Union R. Co.* (1915) 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986.

to the time within which the appeal must be taken are set out below.<sup>29</sup>

### *XLII. Procedure in general.*

While questions of local practice and procedure are not within the scope of annotation of this character, it has been deemed best to include the points set out below as being of some general interest and value.

In general, it may be said that the statutes have attempted to provide for a procedure that is simple, flexible, and speedy.<sup>30</sup> Proceedings under the Minnesota act are governed by the provisions contained in the act itself, and not by the general provisions of law relative to civil actions generally, and hearings under the act are to be held at the time and place fixed by the judge, regardless of the time and place of holding the regular terms of court.<sup>31</sup> Although a proceeding under the workmen's compensation act is not an equity cause, the practice, broadly speaking, follows that prevailing in equity, and not that in

law.<sup>32</sup> The members of the Industrial Accident Board are not judicial officers within the meaning of the Constitution.<sup>33</sup> And it has been held that the Minnesota Commission is not a governmental agency of the state.<sup>34</sup>

A father may institute proceedings where an unmarried son has been killed;<sup>35</sup> and where an employee died intestate, leaving a mother, but neither father, brothers, nor sisters, nor widow, the proceedings for compensation are properly set on foot by the mother.<sup>36</sup>

The judgment in an action brought by an infant by his next friend, to recover compensation as an employee for injury suffered in the course of his employment, binds the plaintiff to the extent of the questions involved as effectively as an action for damages generally, without reliance upon the compensatory features of the statute.<sup>37</sup>

Various other holdings upon matters of procedure are set out in the note below.<sup>38</sup>

<sup>29</sup> It is a compliance with the provisions of the Massachusetts statute that an appeal from a decree based upon an order or decision of the Industrial Accident Board must be presented to the court within ten days after the notice of the filing thereof by the Board; if the required papers are presented to the court in the sense of being filed as a part of its record, the case need not be actually brought to the attention of a justice of the superior court within that time. *Re McPhee* (1915) — *Mass.* —, 109 N. E. 633.

Under the amendment of 1913, the petition must be actually filed with the clerk within one year after the accident, and it is not enough to present it to the judge. *Hendrickson v. Public Service R. Co.* (1915) — *N. J. L.* —, 94 Atl. 402.

<sup>30</sup> The plaintiff, upon an appeal by the defendant from a judgment rendered against him under the workmen's compensation act, made by a motion to dismiss, raised a question whether the questions of law involved are so doubtful as to require the filing of briefs; and if upon the resulting hearing the court is fully satisfied that no ground for a reversal exists, an affirmance will be ordered. *Cain v. National Zinc Co.* (1915) 94 *Kan.* 679, 146 *Pac.* 1165.

A procedure under the compensation act should be flexible and adapted to the direct accomplishment of the aim of the act with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to the terms of the act. *Hunnewell's Case* (1915) 220 *Mass.* 351, 107 N. E. 934.

<sup>31</sup> *State ex rel. Duluth Diamond Drilling Co. v. District Ct.* (1915) 129 *Minn.* 423, 152 N. W. 838.  
L.R.A.1916A.

<sup>32</sup> *Pigeon's Case* (1913) 216 *Mass.* 51, 102 N. E. 932, *Ann. Cas.* 1915A, 737, 4 N. C. C. A. 516; *Gould's Case* (1913) 215 *Mass.* 480, 102 N. E. 693, *Ann. Cas.* 1914D, 372, 4 N. C. C. A. 60.

<sup>33</sup> *Pigeon's Case* (*Mass.*) *supra*.

The Industrial Accident Board is not a judicial body, since its determinations and awards are not enforceable by execution or other process until a binding judgment is entered thereon in a regularly constituted court. *Mackin v. Detroit-Timkin Axle Co.* (1915) — *Mich.* —, 153 N. W. 49.

<sup>34</sup> The Minnesota Employee's Compensation Commission, created by Laws 1909, chapter 286, was not a governmental agency of the state, nor were its members public officers so that they were relieved from personal liability for debts contracted in the name of the Commission, beyond the amount of its appropriation, with a creditor having no knowledge of the deficiency. *Wilkinson v. Mercer* (1914) 125 *Minn.* 201, 146 N. W. 362.

<sup>35</sup> *Reimers v. Proctor Pub. Co.* (1914) 85 *N. J. L.* 441, 89 *Atl.* 931, 4 N. C. C. A. 738.

<sup>36</sup> *McFarland v. Central R. Co.* (1913) 84 *N. J. L.* 435, 87 *Atl.* 144, 4 N. C. C. A. 592.

<sup>37</sup> *Hoey v. Superior Laundry Co.* (1913) 85 *N. J. L.* 119, 88 *Atl.* 823.

<sup>38</sup> Upon an appeal from a commissioner's award the ordinary record fees are to be paid by the appellant who takes the case to court. *Bayon v. Beckley* (1915) — *Conn.* —, 93 *Atl.* 139.

A verdict of the jury is sufficient to sustain a judgment for compensation where the verdict reads that the jury finds the issues in favor of the petitioner, and that he is entitled to recover compensation, although the jury does not find the amount of compensation, and from whom he is entitled to



recover, where the evidence shows without contradiction that the deceased left a widow and minor child and his average weekly earning had been stipulated, and it was further stipulated that he had contributed to the support of his wife and children within five years preceding his death. *Dragovich v. Iroquois Iron Co.* (1915) — Ill. —, 109 N. E. 999.

The court must exercise its own judgment as to the kind of decree to be entered under the Massachusetts act. *McNicol's Case* (1913) 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522.

Under the Massachusetts statute, part 3, § 11, augmented by statute 1912, chap. 571, § 14, it is not improper that a petition be filed with the copies of the designated proceedings of the Industrial Accident Board, which petition sets forth briefly the nature of the question to be decided. *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.

Where there is a conflict between the findings of the committee of arbitration and the Industrial Insurance Board, the findings of the Board control, and those of the committee in conflict therewith are overruled. *Septimo's Case* (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.

The obligation placed upon the superior court by the requirement of the Massachusetts act to enter a decree in accordance with the decision is to exercise its judicial function by entering such decree as will enforce the legal right of the parties as disclosed by the facts appearing on the record; the action of the superior court is not a mere perfunctory registration of approval of the conclusions of law reached by the Industrial Accident Board. *McNicol's Case* (Mass.) supra.

Where the employer and the employees stipulated the facts, and that the proceeding may be heard directly by the Industrial Accident Board, and on appearing before the Board, the claimant and her counsel proceeded upon the theory that a hearing before such Board should be had, and it was not then urged that the parties were bound by the stipulation, the court will not reverse the finding of the Industrial Accident Board, upon the theory that no hearing should have been held. *Vereeke v. Grand Rapids* (1915) — Mich. —, 151 N. W. 723.

Attorneys for an employee injured in Kansas cannot enforce an attorneys' lien against the employers by virtue of a Missouri contract entered into between them and the employee whereby they were to prosecute a suit for damages, and were to receive 50 per cent of the amount realized. *L.R.A.1916A.*

whether collected by suit, settlement, or otherwise, where three days prior to such contract, the employee received from his employer the sum of \$10 and signed a receipt for compensation under the Kansas workmen's compensation act, and subsequently received other weekly payments, and finally accepted a lump sum in full satisfaction and discharge of all claims accrued or to accrue in respect to his injury. *Piatt v. Swift & Co.* (1915) 188 Mo. App. 584, 176 S. W. 434.

The small cause court is without jurisdiction to determine the liability of a corporation upon an agreement executed by one of its injured employees under an agreement of settlement based upon the provision of the employers' liability act. *Parro v. New York, S. & W. R. Co.* (1913) 85 N. J. L. 155, 88 Atl. 825, 4 N. C. C. A. 680.

The claim that the employee refused to submit to a medical examination at the trial is not substantiated where, although, before the arrival of the employer's physician, the employee's counsel announced that they would not consent to an examination, no demand was made after the physician's arrival, and the anticipatory refusal did not lead the employer to countermand the call to the physician to attend the trial, and be sworn as a witness. *Birmingham v. Lehigh & W. Coal Co.* (1915) — N. J. L. —, 95 Atl. 242.

Under art. 4, § 1, of the Oregon Constitution, providing that any measure referred to the people shall take effect and become the law when it is approved by the majority of the votes passed thereon, and not otherwise, and under chap. 112 of the Laws of 1913, commonly known as the "workmen's compensation act," providing that workmen should have the benefit of the act "after June 30th next following the taking effect of this act," the Secretary of State, as the public auditor, was justified in refusing to audit or draw his warrant on the treasurer in payment of a claim for hospital accommodation to workmen furnished in accordance with the terms of the act, during December, 1913, where the compensation act was approved at the election held throughout the state on November 4th, 1913, the court holding that under the plain provisions of the Constitution and the act the latter would not take effect until after June 30th, 1914. *Salem Hospital v. Olcott* (1913) 67 Or. 448, 136 Pac. 341, 4 N. C. C. A. 614.

Where an order for a jury trial was made at a preliminary hearing, such order may be overruled at a final hearing. *Sinnes v. Daggett* (1914) 80 Wash. 673, 142 Pac. 5.

W. M. G.

## WISCONSIN SUPREME COURT.

FRIEDA VENNEN, Admr., etc., of Gerhard Vennen, Deceased, Appt.,  
v.  
NEW DELLS LUMBER COMPANY,  
Respt.

(— Wis. —, 154 N. W. 640.)

**Master and servant — workmen's compensation act — liability for typhoid fever.**

1. Typhoid fever contracted by an employee through the negligent contamination of drinking water furnished by the employer is within an act providing compensation for injury accidentally sustained by an employee while performing service growing out of an incident to his employment.

*For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.*

**Same — negligent injury — applicability of statute.**

2. Injuries caused by the employer's negligence are within the operation of a statute providing compensation for injuries accidentally sustained by an employee while performing service growing out of and incidental to his employment.

*For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.*

(Barnes, J., dissents.)

(October 26, 1915.)

**A**PPEAL by plaintiff from an order of the Circuit Court for Eau Claire County overruling a demurrer to the defense in an action brought to recover under the workmen's compensation act for the death of plaintiff's husband, alleged to have been caused by defendant's negligence. Affirmed.

**Statement by Sicbecker, J.:**

This is an action to recover damages alleged to have been sustained by the plaintiff as administratrix of her husband's estate and as his widow on account of her husband's death.

The defendant is a corporation organized under the laws of the state of Wisconsin. The deceased, Gerhard Vennen, was employed by the defendant during the spring and early summer of the year 1914. The defendant was engaged in operating a manufacturing lumber establishment located on the Chippewa river, in the city of Eau

**Note.**—As to the construction and application of the workmen's compensation act generally, see annotation, ante, 23.

As to whether compensation is recoverable for incapacity caused by a disease contracted while the workman is acting within the scope of his employment, see annotation, post, 289.

L.R.A.1916A.

Claire, Wisconsin. In connection with its establishment the defendant maintained an outhouse and two toilets for its employees working there, and a toilet in its principal office building. All of the sewage from these toilets was discharged into the river near defendant's establishment. The pleadings allege that the defendant, in supplying water for its boilers, not only secured water from the city waterworks, but also used water from the river, which was obtained by means of intake pipes; that the defendant was negligent in placing its intake pipes in such location that they carried into the boilers water that was contaminated by the sewage; and that this water, through defendant's negligence, became mixed with the water from the city waterworks, because of improper connecting pipes. It is further alleged that the defendant negligently permitted and caused the employees to drink of this polluted water, and thereby caused the deceased, Gerhard Vennen, to become sick with typhoid fever, which resulted in his death on July 25, 1914.

The defendant alleges and claims that the court had no jurisdiction of the matter, because the defendant at the time here in question had more than four employees engaged in a common employment, and that it had filed notice of election to accept the provisions of the workmen's compensation act, and that the plaintiff's intestate had never filed any election not to accept the provisions thereof. Plaintiff demurred to this defense on the ground that it did not state facts sufficient to constitute a defense.

The circuit court ordered that the demurrer be overruled. From such order, this appeal is taken.

Messrs. Fred Arnold and Daniel H. Grady for appellant:

The typhoid illness of the intestate was not an accidental injury within the meaning of the compensation act.

Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; McNicol's Case, 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522; Craske v. Wigan [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35; Hoenig v. Industrial Commission, 159 Wis. 646, post, 339, 150 N. W. 996, 8 N. C. C. A. 192; Steel v. Cammell, L. & Co. [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; Adams v. Acme White Lead & Color Works, 182 Mich. 157, post, 283, 148 N. W. 485, 6 N. C. C. A. 482; Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N.



Y. 304, 20 Am. St. Rep. 748, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A. 1915B, 872, 106 N. E. 607; Ludwig v. Preferred Acci. Ins. Co. 113 Minn. 510, 130 N. W. 5; Sherwood v. Johnson, 5 B. W. C. C. 686; Broderick v. London County Council [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885; Fenton v. J. Thorley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 864, 5 W. C. C. 1; Brintons v. Turvey [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 21 Times L. R. 444, 92 L. T. N. S. 578, 6 Ann. Cas. 137; Marshall v. East Holywell Coal Co. 93 L. T. N. S. 360, 21 Times L. R. 494; Hichens v. Magnus Metal Co. 35 N. J. L. J. 327; Re Sheeran, 28 Ops. Atty. Gen. 254.

Typhoid infection does not arise out of and is not peculiar to the discharge of the duties which the intestate was to perform.

Hoenig v. Industrial Commission, 159 Wis. 646, post, 339, 150 N. W. 996, 8 N. C. C. A. 192; Amys v. Barton [1912] 1 K. B. 40, [1911] W. N. 205, 81 L. T. J. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29; McNicol's Case, 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522; Byrant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Craske v. Wigan [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35.

There is nothing in the act itself to indicate that the intent or purpose of this enactment was to provide compensation in all cases where an action might otherwise be maintained for the recovery of damages.

Steel v. Cammell, L. & Co. [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; Adams v. Acme White Lead & Color Works, 182 Mich. 157, post, 283, 148 N. W. 485, 6 N. C. C. A. 482; Broderick v. London County Council [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885; Fenton v. J. Thorley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1.

Messrs. Sturdevant & Farr, for respondent:

Where the conditions of compensation exist for any personal injury or death, the right of recovery of such compensation pursuant to the provisions of the act is exclusive.

Milwaukee v. Althoff, 156 Wis. 68, post, 327, 145 N. W. 238, 4 N. C. C. A. 110; Smale v. Wrought Washer Mfg. Co. 160 Wis. 331, 151 N. W. 803. L.R.A.1916A.

The workmen's compensation act should be construed liberally in favor of its purposes, and not strictly as a statute in derogation of the common law.

Sadowski v. Thomas Furnace Co. 157 Wis. 443, 146 N. W. 770; Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877.

The contracting of disease is a personal injury.

State ex rel. McManus v. Policemen's Pension Fund, 138 Wis. 133, 20 L.R.A.(N.S.) 1175, 119 N. W. 806.

An accident covers all injuries accidentally sustained caused by negligence, as well as those occurring without the fault of any human agency.

Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41.

The workmen's compensation act applies to injuries caused by disease, if the disease was the result of an accidental injury.

Voelz v. Industrial Commission, — Wis. —, 152 N. W. 830; Heileman Brewing Co. v. Schultz, — Wis. —, 152 N. W. 446; Klawinski v. Lake Shore & M. S. R. Co. — Mich. —, post, 342, 152 N. W. 213.

A person walks, runs, eats, and drinks voluntarily, and yet he may sustain an accidental injury in doing either of such acts.

United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A. (N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; Higgins v. Campbell [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 660, 20 Times L. R. 129; Ismay v. Williamson [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713.

Siebecke, J., delivered the opinion of the court:

This appeal presents an important question as to the liability and nonliability of employers under the provisions of the workmen's compensation act. The ruling upon the demurrer to the answer assumes that the facts stated in the pleading exist as alleged, regardless of evidence in respect thereto. Section 2394—3, subd. 3, provides that, where the right to compensation under the provisions of the workmen's compensation act exists for personal injury or death, it shall be the exclusive remedy against the employer for such injury or death. Milwaukee v. Althoff, 156 Wis. 68, post, 327, 145 N. W. 238, 4 N. C. C. A. 110; Smale v. Wrought Washer Mfg.

Co. 160 Wis. 331, 151 N. W. 803. By § 2394—3 it is enacted:

"Liability for the compensation herein-after provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, . . . in those cases where the following conditions of compensation concur: . . .

"(2) Where . . . the employee is performing service growing out of and incidental to his employment. . . .

"(3) Where the injury is proximately caused by accident, and is not . . . intentionally self-inflicted."

The facts alleged show that the parties to the action were subject to the compensation act. The inquiry then is: Was Vennen's death proximately caused by accident while he was "performing services growing out of and incidental to his employment?" The inference from the alleged facts is reasonably clear that Vennen at the time of the alleged injury resulting in his death was "performing services growing out of and incidental to his employment."

The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the compensation act is not well founded. As declared in *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877: "In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject-matter relative to which they are employed."

The words should be given, as intended by the lawmakers, their popular meaning. *Sadowski v. Thomas Furnace Co.* 157 Wis. 443, 146 N. W. 770.

"A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured which contributes to produce them. . . . Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so."

Accidents without negligence are rare as compared to accidents resulting from negligence. Opinion of Paine, J., in *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174. The intention of the legislature to include accidental injuries resulting from negligence within the language of the compensation act is so manifest that there is no room to indulge in construction of the language employed. In the popular sense the words as used in L.R.A.1916A.

the compensation act, referring to a personal injury accidentally sustained by an employee while performing services growing out of and incidental to his employment, include all accidental injuries, whether happening through negligence or otherwise, except those intentionally self-inflicted.

The inquiry is: Was the disease from which it is alleged Vennen died proximately caused by accident? Do the facts and circumstances alleged in the case set forth the conditions to entitle an employee to compensation "for any personal injury accidentally sustained," which was "proximately caused by accident?" while "performing services growing out of and incidental to his employment?" We have already noticed that the alleged injury was, under the facts stated in the pleadings, received by deceased while in plaintiff's employ, and while he was "performing services growing out of and incidental to his employment." Whether or not the alleged accidental injury caused Vennen's death is sufficiently pleaded, and remains a question for determination from the evidence at the inquest of the case. There remains the important inquiry: Do the allegations state a case showing that Vennen's death is attributable to "accident" in the sense of the compensation act? It is urged that the contracting of typhoid disease under the facts and circumstances stated does not show that his death was due to an accidental occurrence. The term "accidental," as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while



he was "performing services growing out of and incidental to his employment." It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while "performing services growing out of and incidental to his employment" are injuries within the contemplation of the workmen's compensation act. This was recognized in the case of *Heileman Brewing Co. v. Schultz*, — Wis. —, 152 N. W. 446, and *Voelz v. Industrial Commission*, — Wis. —, 152 N. W. 830. The English compensation act made employers liable to employees for "personal injury by accident arising out of and in the course of the employment." Under this act it has been held that contraction of a disease may be caused by accident. See the following cases: *Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137. A workman became infected through a bacillus from the wool which he was assorting, resulting in giving him the disease of anthrax, of which he died, and it was held that it was a case of "injury by accident." *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, 1 Scot. L. T. 167, 4 N. C. C. A. 899. *Drylie*, a workman in a coal pit, through accident, was exposed to icy cold water up to his knees and became chilled, which made him sick, resulting in pneumonia, of which he died. Upon the evidence adduced the court found that the pneumonia was caused by the chill, and that death resulted from "injury by accident." The cases wherein liability has been found distinguished between disease resulting from accidental injury and disease which results from an idiopathic condition of the system, and not attributable to some accidental agency growing out of the employment. The latter class of diseases are held not to be within the contemplation of the act. We are of the opinion that the decision of the trial court holding that the facts pleaded show that Vennen's death was caused by accident while performing service growing out of and incidental to his employment is correct, and that the demurrer was properly overruled.

The order appealed from is affirmed.

**Barnes, J., dissenting:**

By § 2394—3 liability exists under the compensation act where employer and employee are under it: (1) For "any personal injury accidentally sustained" by the employee while "performing service growing out of and incidental to his employment, . . . where the injury is proximately caused by accident, and is not . . . in-

tionally self-inflicted;" and (2) for death where the employee is performing such service, and where the injury causing death is "proximately caused by accident," and not intentionally self-inflicted. To justify recovery under this statute, where death does not ensue, there must be a personal injury actually sustained, which injury is proximately caused by accident. Where recovery is sought for death, the statute does not in express terms say that a personal injury must actually be sustained, but only that there must be an injury "caused by accident."

I think it is very improbable that the legislature intended to give compensation where death resulted from an accident and deny it in case of mere disability, and that by fair implication it was intended to allow compensation for death only where it resulted from "personal injury;" in other words, if recovery can be had in case of death from typhoid fever, then indemnity should be allowed for disability and medical attendance in case of recovery. If this be so, then two things must occur as a condition precedent to recovery: There must be a personal injury; and it must be caused by accident. If the taking of typhoid germs into the system is a "personal injury" and an "accident," within the meaning of the law, then the decision is right. If there can be a recovery in the case of typhoid fever, then the same result would follow for tuberculosis, pneumonia, smallpox, anthrax, ordinary colds, and other diseases, where the sick employee was able to trace the cause of his sickness to some unusual conditions in the surroundings in which he worked. If I understand the opinion correctly, most, if not all, diseases may be accidental, and recovery may be had on account of the same, except those of an "idiopathic" character. "Idiopathy" is defined as "a morbid state or condition not preceded and occasioned by any other disease; an individual or personal state of feeling; a mental condition peculiar to one's self." "Idiopathy" is defined as "of or pertaining to a . . . morbid state; not secondary or arising from any other disease; as an idiopathic affection." Century Dict.

The peculiar concern of this court is to get at the legislative intent. When the court ascertains that intent, it has not only performed its full duty, but has exhausted its legitimate powers. It has no right to curtail or extend the provisions of any statute. The compensation act as now construed by the court will, I think, add materially to the liabilities popularly supposed to exist under the act, if it does not double them. If the legislature so intend-

ed, well and good. I cannot bring myself to believe that it did so intend.

It is a matter of common knowledge that cases of sickness and disease are much more numerous than cases of what are commonly known as accidents. The compensation act was passed after an exhaustive study of the subject of industrial insurance by a committee of the legislature, which covered a period of two years. There were two classes of acts in operation in other jurisdictions,—one covering diseases and accident, the other not, in terms at least, covering disease. If it had been the purpose of the legislature to include the large class of cases that would result from sickness, it is fair to presume that it would have done so in express and unmistakable terms, and not by the use of language that is at least popularly understood not to include them. In the numerous discussions on the proposed law before the legislature, which are fresh in mind, it does not appear to have occurred to anyone that diseases were included or intended to be included. In the four years that have elapsed since the original act was passed, thousands of cases of sickness other than those of an "idiopathic" character must have arisen where there was ground for claiming that the sickness was contracted in the course of employment, and yet this is the first case where the claim was made that the compensation act applies to sickness. Even the representative of the deceased is not making such a claim here. On the contrary, she is resisting it, and insisting that she is free to pursue her common-law remedy.

Now, the words "personal injury" are words commonly and ordinarily used to designate injury caused by external violence, and they are not used to indicate disease. Neither do we speak of sickness as an "accident" or an "injury." When we hear that someone has suffered an accident, we at once conclude that he has suffered some more or less violent external bodily injury. It is in this sense, I think, that the words "personal injury" and "injury . . . caused by accident" are used in the statute. When our neighbor has typhoid fever, we do not think of classifying his ailment as an "accident," an "injury," or a "personal injury." It is only by an extremely far-fetched and, I believe, illogical construction of the words referred to, that they can be held to include disease not resulting from some external violence.

It is well-nigh a demonstrable certainty that the legislature never intended to pro-L.R.A.1916A.

vide compensation for sickness not resulting from external bodily violence. Wisconsin was one of the pioneers in this kind of legislation. It was known that it would entail large burdens on our manufacturers, who would thus be placed at a disadvantage in competing with employers in other states where no such law was then in existence. The law was an optional one, and is so yet. As was expected, there was a great deal of hesitancy on the part of employers about coming under it. Had it been supposed that it provided compensation for disease or sickness, it is probable that the purpose of the law would have been practically nullified. The effect of the decision in this case is, of course, conjectural, but it is not without the range of possibilities that some at least of those who are now under the act will exercise their election not to remain under it. It is now a generally accepted truism that many diseases attack those who are physically weak and run down rather than those who are strong and able to throw off unwelcome disease germs. The weak must work as well as the strong, or else be taken care of by the public, and, should they be discriminated against in the matter of securing employment, much harm would follow. The question whether we should or should not have insurance against sickness is one of legislative policy. The manner of paying such insurance, if decided upon, is also a question of legislative policy within constitutional limits. I do not question the power of the legislature to pass an option law such as we have providing for indemnity against disease. What I do say is that the legislature has not done so, and that the act passed has been stretched by construction so as to add to it in all probability as large a class of claims and liabilities as that actually included in the original act.

The great weight of authority is contrary to the decision in this case. In *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1, it is said that the words "by accident" are used to qualify the word "injury," confining it to certain classes of injuries and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. In *Broderick v. London County Council* [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 895, the inhalation of sewer gas by which an employee contracted enteritis was held not to be a personal injury by accident. *Paraly-*



sis resulting from exposure to contact with lead was held not to be an injury caused by accident. *Steel v. Cammell, L. & Co.* [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142. An abscess in the hand produced by continuous rubbing of a pick handle held not to be an injury produced by accident. *Marshall v. East Holywell Coal Co.* 93 L. T. N. S. 360, 21 Times L. R. 494. Working with a blistered finger among red lead and oil, which produced an inflammation and swelling, held not an injury produced by accident. *Walker v. Lilleshall Coal Co.* [1900] 1 Q. B. 488, 69 L. J. Q. B. N. S. 192, 64 J. P. 85, 48 Week. Rep. 257, 81 L. T. N. S. 769, 16 Times L. R. 108. Copper poisoning resulting from contact with dust produced by filing is not an injury produced by accident. *Hichens v. Magnus Metal Co.* 35 N. J. L. J. 327. Death from anthrax from handling animals that died from this disease held not injury caused by accident. *Sherwood v. Johnson*, 5 B. W. C. C. 686.

The Michigan court has held that, since an accident is an unforeseen event occurring without design, the compensation act of that state (which is similar to ours on the point under discussion) does not cover occupational diseases, which are diseases arising from causes incident to certain employments. *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, post, 283, 148 N. W. 485, 6 N. C. C. A. 482.

Kindred cases dealing with the subject under consideration have arisen under policies of accident insurance. They hold that disease not resulting from or produced by external violence is not an accident for which recovery can be had under such contracts. *Bacon v. United States Mut. Acci. Asso.* (*Stedman v. United States Mut. Acci. Asso.*) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; *Smith v. Travelers' Ins. Co.* 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & Bl. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; *Dozier v. Fidelity & C. Co.* (C. C.) 13 L.R.A. 114, 46 Fed. 446.

By § 2394-11, Stat., it is provided that no claim to recover compensation under §§ 2394-3 to 2394-31, inclusive, shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing be given to the employer stating the time and place of the injury. This must mean that the legislature had in mind something definite and tangible, some-

thing that could be located as to time and place, where it used the word "accident." I do not see how this statute can be complied with in a typhoid fever case.

The New Jersey court, following what it conceives to be the English rule, holds that "where no specific time or occasion can be fixed upon as the time when an alleged accident happened, there is no injury by accident within the meaning of the . . . Compensation Act." *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

The latest expression of the English courts on the subject to which attention has been called is *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230. There a laborer died from ptomaine poisoning caused by the inhalation of sewer gas. It was held that this was not an injury caused by accident, one of the concurring judges saying that there could be no recovery for injury by accident where you cannot give a date, and adding: "It is hardly a lawyer's question."

The *Brintons Case*, cited in the majority opinion, is discussed in *Eke v. Hart-Dyke*, where it is referred to as an extreme case, the logic of which could be approved only on the theory that the anthrax germ which was floating in the air and which lodged in the eye of the deceased produced an abrasion which developed infection. In the decision the case is compared with a spark flying from an anvil and injuring the eyesight.

The Scotch case cited in the opinion (*Alloa Coal Co. v. Drylie*) is authority for affirming the decision in the present case, but is much more restricted in its application than is the present decision. The opinion of Lord Dundas, which was concurred in by a majority of the judges, states: "The present case could never be fairly cited in the future as indicating that the court is willing to hold that a mere ordinary disease, e. g., pneumonia, entitles a workman to compensation. The court must be satisfied . . . that the disease was attributable to some particular event or occurrence of an unusual and unexpected character incident to the employment, which could, in the light of the decisions, be fairly described as an accident."

I think this is the only decided case to which attention has been called which tends to support the decision of the court, while the cases to the contrary are numerous. In the two Wisconsin cases cited, the disease for which recovery was allowed was proximately caused by an injury resulting from external violence.

**MASSACHUSETTS SUPREME JUDICIAL COURT.**

RE WILLIAM HURLE, Employee.

RE PLYMOUTH CORDAGE COMPANY,  
Employer.

RE AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurer, Appt.

(217 Mass. 223, 104 N. E. 336.)

**Master and servant — workmen's compensation act — blindness.**

1. Blindness through optic neuritis due to poisonous gases from a furnace about which the injured person is obliged to work is a personal injury within the meaning of a workmen's compensation act providing compensation for any injury arising out of and in the course of the employment, although the statute requires that information shall be given as to the time, place, and cause of the injury as soon as practical after it is suffered, and that the employer shall make return of an accident resulting in any injury.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — absence of direct lesion — Industrial Accident Board.**

2. Giving supervision of claims under the workmen's compensation act to an "Industrial Accident Board, does not restrict compensation to injuries caused by visual contact or direct lesion.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(February 28, 1914.)

**A**PPEAL by the insurer from a decree of the Superior Court for Suffolk County affirming a decision of the Industrial Accident Board holding claimant totally incapacitated for work under the workmen's compensation act, and ordering the insurer to pay him certain amounts for the injury sustained. Affirmed.

The facts are stated in the opinion.

Mr. Edward C. Stone, with Messrs. Sawyer, Hardy, & Stone, for appellant:

An employee suffering from acute optic neuritis is not entitled to compensation under the workmen's compensation act.

28 Ops. Atty. Gen. 254; Com. v. Mosby, 163 Mass. 291, 39 N. E. 1030; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, 172 Mass. 490, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E.

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to whether compensation is recoverable for incapacity resulting from diseases following accidents, see annotation, post, 289. L.R.A.1916A.

747, 5 Am. Neg. Rep. 367; Berard v. Boston & A. R. Co. 177 Mass. 179, 58 N. E. 586; Steverman v. Boston Elev. R. Co. 205 Mass. 508, 91 N. E. 919; Driscoll v. Gaffey, 207 Mass. 107, 92 N. E. 1010; Steel v. Cammell [1905] 2 K. B. 232, 7 W. C. C. 9, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 490; Eke v. Hart-Dyke [1910] 2 K. B. 677, 3 B. W. C. C. 482, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 N. C. C. A. 230.

Mr. Edwin A. Howes, Jr., for appellee.

Rugg, Ch. J., delivered the opinion of the court:

This is a case under the workmen's compensation act. The facts as found by the Industrial Accident Board are that the employee is totally incapacitated for work by personal injury which arose out of and in the course of his employment, and which caused total loss of vision in both eyes, and which resulted from an acute attack of optic neuritis induced by poisonous coal tar gases. His work was about furnaces for producing gas by the burning of coal, in the top of which were several holes through which, after opening a cover, he could watch the fire. It was his duty to see that the furnaces were supplied with coal and burning evenly, and to prevent incandescent spots caused by the burning by forced draft. It was necessary for him to open one or another of these holes about seventy times a day, and whenever these holes were opened poisonous gases were given forth. The inhalation of these caused his blindness.

The question to be decided is whether this was a "personal injury arising out of and in the course of his employment" within the meaning of those words in Stat. 1911, chap. 751, p. 2, § 1. Unquestionably it arose out of and in the course of his employment. The only point of difficulty is whether it is a "personal injury."

The words "personal injury" have been given in many connections a comprehensive definition. They are broad enough to include the husband's right to recover for damage sustained by bodily harm to his wife, the alienation of a husband's affections, the seduction of one's daughter, and other kindred tortious acts. Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349, and cases there cited; Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644; New York, P. & N. R. Co. v. Waldron, 116 Md. 441, 39 L.R.A.(N.S.) 502, 82 Atl. 709; Jefferson Fertilizer Co. v. Rich, 182 Ala. 633, 62 So. 40; McDonald v. Brown, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; Tomlin v. Hildreth, 65 N. J. L. 440, 445, 47 Atl. 649; Sharkey v.



Skilton, 83 Conn. 503, 510, 77 Atl. 950. They are not confined to the instances where the wrong can be described technically as trespass to the person *vi et armis*. The statement in *Com. v. Mosby*, 163 Mass. 291, 294, 39 N. E. 1030, that a "threat to injure the person of another naturally means a threat to use actual physical force," is not at variance with this idea. There were special reasons why the word "injury" was given a constricted meaning in 28 Opinions of the Attorneys General of the United States, 254. It has been interpreted broadly in policies of accident insurance. *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

At common law the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present. *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697; *Allen v. Boston*, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519; *Larson v. Boston Elev. R. Co.* 212 Mass. 267, 98 N. E. 1048; *Deisenrieter v. Kraus-Merkel Malting Co.* 92 Wis 164, 66 N. W. 112; *Wagner v. H. W. Jayne-Chemical Co.* 147 Pa. 475, 30 Am. St. Rep. 745, 23 Atl. 772. See also *Gossett v. Southern R. Co.* 115 Tenn. 376, 1 L.R.A.(N.S.) 97, 112 Am. St. Rep. 846, 89 S. W. 737. Damages of this sort have been held not recoverable under the mill acts, although an independent action would lie if a nuisance was created. *Eames v. New England Worsted Co.* 11 Met. 570; *Fuller v. Chicopee Mfg. Co.* 16 Gray, 46. See also *Wellington v. Boston & M. R. Co.* 158 Mass. 185, 189, 33 N. E. 393. The preponderance in recent years of actions grounded upon some physical violence has tended to emphasize the aspect of injury which depends upon visual contact or direct lesion. But that is by no means the exclusive signification of the word either in common speech or in legal use.

The English workmen's compensation act affords compensation only where the workman receives "personal injury by accident." It adds to the personal injury alone required by our act the element of accident. Yet it has been held frequently that disease induced by accidental means was ground for recovery; as, for example, a rupture resulting from overexertion (*Fenton v. Thorley* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684); infection of anthrax from a bacillus from wool which was being sorted (*Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137); heat from a furnace (*Ismay v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. L.R.A.1916A.

N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713); sunstroke (*Morgan v. The Zenaida*, 25 Times L. R. 446, 2 B. W. C. C. 19); pneumonia induced by inhalation of gas (*Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 4 B. W. C. C. 417, 48 Scot. L. R. 768. See also *Brown v. Kent* [1913] 3 K. B. 624, 82 L. J. K. B. N. S. 1039, 109 L. T. N. S. 293, 29 Times L. R. 702, 6 B. W. C. C. 745, and *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 6 B. W. C. C. 398, 50 Scot. L. R. 350. We lay these cases on one side, however, because it is plain from the third schedule of Stat. 6 Edward VII. chap. 58, that certain occupational diseases were intended to be included within the English act.

*Hood v. Maryland Casualty Co.* 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329, goes far toward deciding the case at bar. That was an action by an employer of labor against an insurer who had contracted to indemnify against damages sustained by the employer by reason of liability to its employees for "bodily injuries accidentally suffered" by them in their employment. The employer had been obliged to respond in damages to one Barry, an employee, who had become infected by glanders while cleaning a stable. It was said in the opinion, at page 225 of 206 Mass.: "It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed, it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been." That case related to the kind of bodily injuries which arise from the relation of master and servant. It was decided about one year before the enactment of our workmen's compensation act. It relates to the same general subject-matter. The law of accident insurance has been applied to injuries under the workmen's compensation act in England. *Wicks v. Dowell* [1905] 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732.

There is nothing in the act which leads to the conclusion that "personal injuries" was there used in a narrow or restricted sense. The provisions as to notice of the injury (part 2, §§ 15-18, both inclusive, as amended by Stat. 1912, chap. 172, and chap. 571, § 3) indicate a purpose that information shall be given as to the time, place, and cause of the injury as soon as practicable after it is suffered. But this requirement can be complied with in the case of an injury caused by the inhalation of a poisonous gas producing such results as here are disclosed, as well as in the case

of a blow upon the body. An argument may be drawn from the provisions of part 3, § 18, as amended by Stat. 1913, chap. 746, § 1, in favor of a liberal interpretation of "personal injuries." By the section as originally enacted the duty was imposed upon every employer to keep a record of all injuries, but he was required to make return to the Industrial Accident Board only of "an accident resulting in a personal injury." By the amendment, which, of course, has no effect upon the legal rights of the parties in the present action, but which may be resorted to for discovery of legislative intention, the employer is required to make return of "the occurrence of an injury" and to state "the date and hour of any accident causing the injury." If these words are used accurately, a distinction is drawn between the injury and the accident causing the injury. The authority conferred upon the board of directors of the Massachusetts Employees' Insurance Association, by part 4, § 18, is to "make and enforce reasonable rules and regulations for the prevention of injuries," and not for the prevention of accidents. See also Stat. 1913, chap. 813. The name "Industrial Accident Board," which is the administrative body created by part 3, is a mere title, and cannot fairly be treated as restrictive of its duties.

The difference between the English and Massachusetts acts in the omission of the words "by accident" from our act, which occur in the English act as characterizing personal injuries, is significant that the element of accident was not intended to be imported into our act. The noxious vapors which caused the bodily harm in this case

were the direct production of the employer. The nature of the workman's labor was such that they were bound to be thrust in his face. The resulting injury is direct. If the gas had exploded within the furnace and thrown pieces of "cherry" hot coal through the holes into the workman's eyes, without question he would have been entitled to compensation. Indeed there probably would have been common-law liability in such case. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227, 87 N. E. 567. There appears to be no sound distinction in principle between such case and gas escaping through the holes and striking him in the face whereby through inhalation the vision is destroyed. The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words "injury" or "injuries," and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if accident had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word "injury," and not "accident," was employed by the legislature throughout this act. It would not be accurate but lax to treat the act as if it referred merely to accidents. *Warner v. Couchman* [1912] A. C. 35, at page 38, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 5 B. W. C. C. 177, 49 Scot. L. R. 681.

Decree affirmed.

## SUPREME COURT OF CALIFORNIA. (In Banc.)

### GREAT WESTERN POWER COMPANY v.

A. J. PILLSBURY et al., as Members of  
and Constituting the Industrial Accident  
Commission of the State of California.

(— Cal. —, 151 Pac. 1136.)

### Master and servant — workmen's compensation act — blood poisoning.

Blood poisoning from an abrasion of the skin received by an employee in the course of his employment is a proximate result of

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for incapacity resulting from disease, see annotation, post, 289.  
L.R.A.1916A.

the injury, so as to come within the operation of the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(September 21, 1915.)

**A**PPPLICATION by petitioner for a writ to review an award of the Industrial Accident Commission directing it to pay to an injured employee a certain amount as compensation for an injury alleged to have been suffered by him while in petitioner's employ. Affirmed.

The facts are stated in the opinion.

Messrs. Guy C. Earl and W. H. Spaulding, for petitioner:

The injury and disability claimed herein was not "proximately caused by accident," within the meaning of § 12 of the workmen's compensation act, but was due to infection by germs suffered later at some



time and place not disclosed by the evidence.

*Mitchell v. Glamorgan Coal Co.* 23 Times L. R. 588, 9 W. C. C. 16; *Walker v. Lilleshall Coal Co.* [1900] 1 Q. B. 488, 81 L. T. N. S. 769, 2 W. C. C. 7, 69 L. J. Q. B. N. S. 192, 64 J. P. 85, 48 Week. Rep. 257, 16 Times L. R. 108; *Chandler v. Great Western R. Co.* (1912) 106 L. T. N. S. 479, 5 B. W. C. C. 254.

Messrs. **Christopher M. Bradley and Aaron L. Sapiro**, for respondents:

The findings of fact made by the Commission are conclusive.

*Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Bentley's Case*, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; *Rayner v. Sligh Furniture Co.* 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851; *Rumboll v. Nunery Colliery Co.* 80 L. T. N. S. 42, 63 J. P. 132, 1 W. C. C. 28; *Diaz's Case*, 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609; *Nickerson's Case*, 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645; *George v. Glasgow Coal Co.* [1908] W. N. 219, 25 Times L. R. 57, 46 Scot. L. R. 28, 21 B. W. C. C. 125, 99 L. T. N. S. 782; *Rees v. Powell Duffryn Steam Coal Co.* 64 J. P. 164; *John v. Albion Coal Co.* 18 Times L. R. 27, 65 J. P. 788, 4 W. C. C. 15; *Douglas v. United Mineral Min. Co.* 2 W. C. C. 15; *Herrick's Case*, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554; *Burns's Case*, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *Buckley's Case*, 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613; *Leishmann v. Dixon*, [1910] S. C. 498, 47 Scot. L. R. 410, 3 B. W. C. C. 560; *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, L.R.A.—, 140 Pac. 591, 948; *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877.

**Shaw, J.**, delivered the opinion of the court:

This is an original application to this court, under § 84 of the workmen's compensation act, to review the award of the Industrial Accident Commission directing the petitioner to pay to one Ernest Dreyer the sum of \$78.97, and the further sum of \$9.37 each week, beginning September 17, 1914, until the termination of the disability. Dreyer was injured while in the employment of the petitioner and in the course of said employment. The only point made L.R.A.1916A.

against the award is the claim that the accident was not the proximate cause of the disability for which the award was made.

Dreyer was engaged in shaving and painting poles for the petitioner. On July 1, 1914, while at work, he accidentally caught his left hand between one of the poles and another piece of timber, thereby bruising the flesh and knocking a small piece of skin off the back of the hand. For the next two days, July 2d and July 3d, he continued his work, but used the other hand only. On the third day the injured hand began to pain him severely. The 4th came on Saturday, and no work was carried on. On Monday he was unable to work, because of the condition of the hand and the severe pain therein. Inflammation and suppuration set in; the same being produced by poisonous germs entering the flesh through the break in the skin caused by the accident. It was, of course, impossible to ascertain the source of these germs, or when they gained entrance; but the time that elapsed between the abrasion and the beginning of the severe pain, which developed into the suppuration, was the usual period of infection of the variety styled by the physician as "staphylococci." This, it appears, is the scientific name of one form of the disease commonly termed blood poisoning by the uninitiated. The disability for which the award was made was caused by this inflammation and suppuration.

We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses. The accident was the proximate cause of the injury, within the definition of the term "proximate cause" as elaborately stated by Justice Henshaw in *Merrill v. Los Angeles Gas & Electric Co.* 158 Cal. 503, 31 L.R.A.(N.S.) 559, 139 Am. St. Rep. 134, 111 Pac. 534. We need not here repeat the definition or the discussion of the subject given in that opinion. It follows that the award of the Commission must be affirmed.

We concur: **Angellotti, Ch. J.; Sloss, J.; Melvin, J.; Lorigan, J.; Lawlor, J.**

Petition for rehearing denied October 18, 1915.

## MICHIGAN SUPREME COURT.

SARAH E. ADAMS

v.

ACME WHITE LEAD & COLOR WORKS,  
Plff. in Certiorari.

(182 Mich. 157, 148 N. W. 485.)

**Master and servant — workmen's compensation act — occupational disease.**

1. A statute providing compensation in case an employee receives a personal injury arising out of and in the course of his employment does not include an occupational disease such as lead poisoning, where the title purports to provide compensation for accidental injuries.

*For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.*

**Statute — title — sufficiency.**

2. A title to an act providing compensation for accidental injury will not cover a provision of compensation for occupational disease.

*For other cases, see Statutes, I, e, 2, in Dig. 1-52 N. S.*

(July 25, 1914.)

**C**ERTIORARI to the Industrial Accident Board to review an order affirming a decision of the arbitration committee in favor of claimant, and awarding compensation to her for the death of her husband because of injuries received while in defendant's employment. Reversed.

The facts are stated in the opinion.

Messrs. Douglas, Eaman, & Barbour, for plaintiff in certiorari:

Lead poisoning is not an accident.

Bacon v. United States Mut Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Hensey v. White [1900] 1 Q. B. 481, 69 L. J. Q. B. N. S. 188, 48 Week. Rep. 257, 63 J. P. 804, 81 L. T. N. S. 767, 16 Times L. R. 64; Steel v. Cammell [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; Broderick v. London County Council [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 1 B. W. C. C. 219, 16 Ann. Cas. 885; Eke v. Hart-Dyke [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to whether the workmen's compensation acts cover occupational diseases, see annotation, post, 289.  
L.R.A.1916A.

L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482; Walker v. Hockney Bros. 2 B. W. C. C. 20; Martin v. Manchester Corp. [1912] W. N. 105, 106 L. T. N. S. 741, 76 J. P. 251, 28 Times L. R. 344, [1912] W. C. Rep. 289, 5 B. W. C. C. 259.

It was not the intention of the legislature to provide compensation for "diseases," but for "accidents" only.

Steel v. Cammell [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; Eke v. Hart-Dyke [1910] 2 K. B. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482; Hichens v. Magnus Metal Co. 35 N. J. L. J. 327.

If the act applies to industrial diseases, it is, so far at least, unconstitutional.

Cooley, Const. Lim. 7th ed. 212; McDonald v. Springwells Twp. 152 Mich. 28, 115 N. W. 1066; Fairview v. Detroit, 150 Mich. 1, 113 N. W. 368; Citizens' Sav. Bank v. Auditor General, 123 Mich. 511, 82 N. W. 214; Grosvenor v. Duffy, 121 Mich. 220, 80 N. W. 19; Re Hauck, 70 Mich. 396, 38 N. W. 269; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Ryerson v. Utley, 16 Mich. 269; Sun Mut. Ins. Co. v. New York, 8 N. Y. 241; Ex parte Knight, 52 Fla. 144, 120 Am. St. Rep. 191, 41 So. 786.

Mr. Noble T. Lawson, for defendant in certiorari:

Lead and other classes of poisoning and diseases contracted in the course of employment have been construed to be accidental injuries, within the meaning of the various compensation acts.

Boyd, Workmen's Compensation, p. 1039, § 453; Higgins v. Campbell [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 660, 20 Times L. R. 129, 6 W. C. C. 1, affirmed in [1905] A. C. 233, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; Ismay v. Williamson [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 42 Ir. Law Times, 213, 52 Sol. Jo. 713, 1 B. W. C. C. 232; Dotzauer v. Strand Palace Hotel, 3 B. W. C. C. 387; Sheeran v. Clayton, 44 Ir. Law Times, 52, 3 B. W. C. C. 583; Kelly v. Auchenlea Coal Co. [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. C. C. 417; Harper, Workmen's Compensation, 23; Evans v. Dodd, 5 B. W. C. C. 305; Stinton v. Brandon Gas Co. 5 B. W. C. C. 426; Hoare v. Arding, 5 B. W. C. C. 36.

The Michigan workmen's compensation act is not limited to accidental injuries, but is broad enough, both in the title and in



the body of the act, to cover injuries of all kinds suffered in the course of employment.

*Brintons v. Turvey* [1905] A. C. 233, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; *Stone v. Travelers' Ins. Co.* National Compensation Journal, Jan. 1914.

Construction of the word "injury" as used in the Michigan act, as covering lead poisoning, would not render the act unconstitutional.

Compensation is to be allowed for injuries, and it is not limited to accidental injuries.

*Barstow v. Smith*, Walk. Ch. (Mich.) 394; *Leoni Twp. v. Taylor*, 20 Mich. 148; *People ex rel. Whipple v. Judge of Saginaw Circuit Ct.* 26 Mich. 342; *People ex rel. Parsons v. Circuit Judge*, 37 Mich. 287; *Sibley v. Smith*, 2 Mich. 486.

*Stone, J.*, delivered the opinion of the court:

The questions involved in this case are raised on certiorari to the Industrial Accident Board. On December 18, 1912, Augustus Adams, a resident of Sandwich, Ontario, began work at the plant of the Acme White Lead & Color Works in the city of Detroit. His duties were those of a sifter or bolter tender in the red lead plant. His work brought him in contact with the lead. On May 29, 1913, he left his work at the quitting time, but that evening became so ill that he was unable to return to work again. He died on June 27, 1913. There is no doubt that the cause of his death was lead poisoning, contracted industrially; i. e., "was an occupational disease," as the return of the Industrial Accident Board shows. The return states: "That during said period between December 18, 1912, and June 27, 1913, one Augustus Adams was in the employ of the Acme White Lead & Color Works; . . . and that during said period, while in the course of said employment, he contracted an occupational disease, to wit, red lead poisoning, upon the premises of the said company, and that, on June 27, 1913, he died as a result of said disease."

The claim of the widow, under act No. 10 of the Public Acts of the Special Session of 1912, was duly presented to a committee of arbitration and allowed. Thereafter, in accordance with the provisions of said act, the respondent filed with the said Board a claim for review of the decision of said committee on arbitration, and later, after a full hearing, the said Board made and entered an opinion and order denying the contention of the respondent, and affirming the award of L.R.A.1916A.

said arbitration committee. The opinion of the said Board, upon which its order was based, so fully presents the questions involved that we cannot do better than to quote therefrom. After referring to the facts above set forth, it is said: "These facts are undisputed, and the sole question in the case is whether the workmen's compensation act covers the case of death by lead poisoning arising out of and in the course of the employment. It is contended on behalf of respondent as follows: (1) That lead poisoning is not an accident; (2) that act No. 10, Public Acts of 1912, was not intended to provide compensation for diseases, but only accidents; (3) if the act does apply to industrial diseases, it is so far unconstitutional. It seems to be established under the English cases that lead poisoning is not an accident. It is an occupational disease. It seems to follow from this that, unless the Michigan workmen's compensation law is broad enough to include and cover occupational diseases, the applicant's claim in this case must be denied. The controlling provision of the act on this point is found in § 1 of part 2, and is as follows: 'If an employee . . . receives a personal injury arising out of and in the course of his employment, he shall be paid compensation, etc. It will be noted that the above language does not limit the right of compensation to such persons as receive personal injuries by accident. The language in this respect is broader than the English act, and clearly includes all personal injuries arising out of and in the course of the employment, whether the same are caused 'by accident' or otherwise. It is equally plain that lead poisoning in this case, in fact, constitutes a personal injury, and that such personal injury was of serious and deadly character. The Board is therefore of the opinion that the section of the Michigan act is broad enough to cover cases of lead poisoning, especially the one in question.

The Board also reached the conclusion that it would not be justified in holding the part of the act referred to invalid on constitutional grounds.

By the assignments of error, it is claimed that the Board erred: First, in construing the said act so as to provide for the awarding of compensation for an occupational disease, specifically red lead poisoning; second, in overruling appellant's contention that, if in said act the legislature intended to provide compensation for an occupational disease, particularly red lead poisoning, said act, in so far as it does so provide, is unconstitutional.

1. Does the Michigan act include and cover occupational diseases? This is a

fair question, and should be fairly answered. What is an "occupation," or "occupational disease?" The Century Dictionary & Cyclopaedia defines an "occupation disease" as "a disease arising from causes incident to the patient's occupation, as lead poisoning among painters." In the instant case the undisputed medical evidence shows that lead poisoning does not arise suddenly, but comes only after long exposure. "It is a matter of weeks or months or years." It is brought about by inhalation, or by the lead coming into the system with food through the alimentary canal, or by absorption through the skin. In any case it is not the result of one contact or a single event. "In occupational diseases it is drop by drop, it is little by little, day after day for weeks and months, and finally enough is accumulated to produce symptoms." It also appears that lead poisoning is always prevalent in the industries in which lead is used, and a certain percentage of the workmen exposed to it become afflicted with the disease. Elaborate precautions are taken against it in the way of instructions to the men, masks to protect the respiratory organs, etc. Whether the workmen will contract it or not will depend upon the physical condition, care, and peculiarity of the individual; and the amount of time it will take to produce ill effects or death also varies.

An "accident" is defined in Black's Law Dictionary as follows: "Accident. An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty."

It might be well to keep in mind the conditions sought to be remedied by the diverse workmen's compensation enactments which have been adopted by several of the states of the Union and in foreign countries. The paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases.

In this our own act is not an exception. It first provides that in any action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense: (a) That the employee was negligent, unless and except it shall appear that such negligence was wilful; (b) that

the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in or incidental to or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

It is then enacted that the above provisions shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employees of any employer who has elected, with the approval of the Industrial Accident Board therein after created, to pay compensation in the manner and to the extent thereafter provided. Manifestly, the terms "personal injury" and "personal injuries," above mentioned, refer to common-law conditions and liabilities, and to not refer to and include occupational diseases, because an employee had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law. Certainly it can be said that in this state no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease. The title of the act is significant: "An Act to Promote the Welfare of the People of This State, Relating to the Liability of Employers For Injuries or Death Sustained by Their Employees, Providing Compensation for the Accidental Injury to, or Death of Employees, and Methods for the Payment of the Same, Establishing an Industrial Accident Board, Defining Its Powers, Providing for a Review of Its Awards, Making an Appropriation to Carry Out the Provisions of This Act, and Restricting the Right to Compensation or Damages in Such Cases to Such as Are Provided by This Act."

The first provision defining the employers who are subject to the act is found in § 5, subdiv. 2, of part 1. It reads: "Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall in the manner provided in the next section have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a with-



drawal of such election, in the manner provided in the next section."

While not controlling, it is pertinent to note the history of the Michigan act.

By act No. 245, Public Acts of 1911, the legislature created a commission "to make the necessary investigation, and to prepare and submit a report . . . setting forth a comprehensive plan, and recommending legislative action, providing compensation for accidental injuries or death of workmen arising out of and in the course of employment."

Section 2 of the act reads: "It shall be the duty of the Commission of Inquiry to fully investigate the conditions affecting and the problems involved in the matter of compensation for accidental injuries or death of workmen arising out of and in the course of employments."

The act drawn pursuant to this authority was passed by the legislature without change. While it cannot be claimed that the power of the legislature was limited to enacting the bill prepared by the Commission, yet, when that body passed the bill without change, it may be said that it adopted the meaning that must have been intended by the Commission.

It is the claim of appellant that lead poisoning contracted industrially is not an accident; that such poisoning, being something that is contracted by a fairly certain percentage of those working in industries where lead is used, cannot be considered as unexpected; that it comes as a gradual, slow process, and hence is not an "accident." The appellee, agreeing with the reasoning of the Board, contends that the act does cover injuries occasioned by lead poisoning, and that such poisoning contracted in the course of employment is an "accidental injury."

The English act of 1897 was entitled: "An Act to Amend the Law with Respect to Compensation to Workmen for Accidental Injuries Suffered in the Course of Their Employment."

The body of the act provided that "if in any employment, to which this act applies personal injury by accident arising out of and in the course of the employment, is caused to a workman, his employer shall . . . be liable."

It was not long before it was necessary to determine what was personal injury by accident, and to give a definition of "accident." In *Mensey v. White* [1900] 1 Q. B. 481, the language of an earlier case was approved where it was said: "I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'"

In *Fenton v. Thorley*, 72 L. J. K. B. N. S. 790, it was said: "The expression L.R.A.1916A.

'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Finally, in *Steel v. Cammell* [1905] 2 K. B. 232, 2 Ann. Cas. 142, the precise point was decided. The applicant, a caulker in the employment of shipbuilders, was seized with paralysis caused by lead poisoning, and became totally incapacitated for work. In the course of his work, in which he had been employed by the shipbuilders for a period of two years before he became incapacitated, he had to smear either with red or white lead certain places between the plates of ships into which water-tight shoes were put. The poisoning was such as might be expected from the nature of the work. It might be caused either by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. Only a small proportion of cases of poisoning of this description occurred amongst a number of persons working with red or white lead. The poisoning could not be traced to any particular day, and its development was a gradual process, and generally took considerable time. Held, that the lead poisoning could not be described as an "accident," in the popular and ordinary use of that word, so as to entitle the applicant to compensation for personal injury by accident arising out of and in the course of his employment, within the meaning of § 1 of the workmen's compensation act of 1897. *Fenton v. Thorley* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, and *Brinton v. Turvey*, [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137, considered.

The court in the above case [*Steel v. Cammell*] reasoned that under the act a date must be fixed as that on which the injury by accident occurred, and it was said: "It has been suggested that there was a series of accidents by the continuous absorption of lead by one or other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the act as to notice of the particular date of the accident or injury."

Others of the judges said that the injury was not unexpected; that it was certain that somebody would suffer, and this man turned out to be susceptible to the poison. As a result of this case, it was found necessary to change the act, if cases like this were to be included; so in 1906, less than a year later, the act of 6 Edw. VII.

chap. 58, was passed, entitled: "An Act to Consolidate and Amend the Law with Respect to Compensation to Workmen for Injuries Suffered in the Course of Their Employment."

The body of the act again provides compensation for "personal injury by accident," but it also (§ 8) provides that "where the disease is due to the nature of any employment . . . he or his dependents shall be entitled to compensation under this act as if the disease . . . were a personal injury by accident, arising out of and in the course of that employment," if it be one of the diseases contained in schedule 3 of the act.

In that schedule "lead poisoning" and its sequelæ are therein scheduled. Of this act the *Encyclopedia of Laws of England*, vol. 5, p. 227, states: "The extension by this act of the principle of workmen's compensation to industrial disease is a new departure. Disease, though contracted accidentally, is not an accident in the ordinary acceptance of the term."

It was also said of the act that a new phase in workmen's compensation—compensation for disease arising out of employment—was a new feature in this type of legislation. The language of the act should be particularly noted. It does not attempt to declare an industrial disease an "accident," but gives compensation therefor "as if the disease . . . were a personal injury by accident."

Considering the condition to be remedied and the history of the Michigan act, and comparing it with the English act of 1897, we are not able to agree with the Accident Board when it says, referring to the language which it quotes, that our act is broader than the English act, and clearly includes all personal injuries arising out of and in the course of an employment, whether the same are caused by "accident" or otherwise. In the language quoted by the Board it is true that the words "personal injury" are used, but in determining the nature of the personal injury intended to be covered by the act, the whole act, with its title, should be examined and considered; and, so examined, we think it should be held that the words "personal injury," as quoted by the Board, refer to the kind of injury included in the title and other portions of the act, which plainly refer to "accidental injury to and death of employees." The whole scope and purpose of the statute, in our judgment, were to provide compensation for "accidental injuries," as distinguished from "occupational diseases." We must hold, therefore, that the provisions of the act of this state are L.R.A.1916A.

very similar to the early English act above referred to.

We have shown how the English act was subsequently amended, by adding the provision permitting the recovery of compensation for certain scheduled diseases caused by, or especially incident to, particular employments,—diseases known as occupation or industrial diseases. Not before, but since, the passage of this amendment to the English act, the English courts have sustained the rights of recovery in such cases as are here presented. The framers of our act either did not know of the amendment to the English act, or else they did not intend to permit the recovery of compensation in such cases. If it is said that it is just as important to protect employees against such conditions as are here presented as it is to protect them against injuries arising from what are strictly termed "accidents," our answer is that that is a matter which should be addressed to the legislature. In the absence of a provision in the statute meeting this situation, the court is unable to award a recovery.

Counsel for appellee have referred to some of the English cases where compensation was allowed for injuries caused by poisoning, but an examination of those cases will show that the injuries were purely accidental. *Higgins v. Campbell* [1904] 1 K. B. 328, affirmed in [1905] A. C. 230, is a fair illustration of those cases. There a workman employed in a wool-combing factory in which there was wool which had been taken from sheep infected with anthrax contracted that disease by contact with the anthrax bacillus which was present in the wool. In that case compensation was allowed, and it was held that the workman was injured by accident arising out of and in the course of his employment within the meaning of the English act of 1897. The court treated the disease as caused by an accident, by one particular germ striking the eyeball. It was considered that the accidental alighting of the bacillus from the infected wool on the eyeball caused the injury. It was treated as if a spark from an anvil hit the eye. This may be seen from the statement of Lord Macnaghten: "It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

We think that this and kindred cases can be readily distinguished from the lead poisoning cases.

The same difficulty about giving notice of the accident or injury noted in the English act applies to the Michigan act. Every employer is required to keep a record of all injuries, fatal or otherwise, received by employees in the course of their employment.



Section 17 of part 3 of our statute provides that "within ten days after the occurrence of the accident resulting in personal injury a report thereof shall be made in writing to the Industrial Accident Board on blanks to be procured from the Board for that purpose."

And a penalty is prescribed for neglect to make such report.

In the instant case Adams left his place of employment at the usual quitting time on May 29, 1913. He did not return. What knowledge his employer had of his sickness does not appear. It is not apparent what notice could be given under our statute in such a case. If our statute, in its present form, should be held to apply to occupational or industrial diseases, then compensation might be claimed of an employer where the term of employment had been for a brief period, whereas the disease may have been contracted while in the employment of a former employer. All this is provided for in the amendment of 1906 in the English act, where provision is made for investigation and apportionment among employers for whom the employee worked during the previous year "in the employment to the nature of which the disease was due." There is no such machinery or procedure provided for in our statute.

We are not unmindful of the holdings of the supreme court of Massachusetts in *Hurle's Case*, 217 Mass. 223, ante, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527, and *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. In the latter case that court held that the personal injury of a lead grinder, sickness incapacitating him from work resulting from the accumulated effect of gradual absorption of lead into his system, arose "out of and in the course of his employment" within the workmen's compensation act (Stat. 1911, chap. 751) of that state. That case is founded upon *Re Hurle*, supra, which was a case of blindness incurred from an acute attack of optic neuritis, induced by the poisonous coal tar gases escaping from a furnace about which he was required to work. The matter of accidental injury was not discussed by the court. The court said: "The question to be decided is whether this was a 'personal injury arising out of and in the course of his employment' within the meaning of those words in [the statute]."

The court further, in referring to the comments of counsel for the employer that the act could not apply to such an injury as that sustained, said: "It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary

sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the legislature throughout this act."

As "accident" is the controlling word in our act, we do not think that the Massachusetts decisions should be held to apply here, as the construction of that act has little, if any, bearing on the Michigan act.

Our attention has been called to the Massachusetts act, which differs in many respects from our act. That act is entitled: "An Act Relative to Payments to Employees for Personal Injuries Received in the Course of Their Employment, and to the Prevention of Such Injuries."

The whole scope of the act seems to be to provide for compensation for personal injuries received in the course of employment. In many instances where the word "accident" occurs in our statute the word "injury" is used in the Massachusetts statute. It is true that the Massachusetts Board is termed an "Industrial Accident Board," but, aside from the use of the word "accident" in that title, we are unable to find the word in the body of the act, except in two instances in § 18 of part 3, which provides for the keeping of a record and making a report of the employer in case of accident. This may be said not to be very controlling; but, in our judgment, it has to do with the inquiry as to the scope of the act. We are unable to follow those cases as authority under our statute.

In New Jersey, in the case of *Hichens v. Magnus Metal Co.* 35 N. J. L. J. 327, which arose under the New Jersey act (P. L. 1911, p. 134), entitled very similarly to the Massachusetts act, to wit, "An Act Prescribing the Liability of an Employer to Make Compensation for Injuries Received by an Employee in the Course of Employment, Establishing an Elective Schedule of Compensation, and Regulating Procedure for the Determination of Liability and Compensation Thereunder," it was held that compensation could not be awarded for a disease known as copper poisoning, caused by contact with the copper filings and inhaling the dust from same by an employee in his work, which involved the grinding and polishing of brass products. This decision cannot be considered as authoritative, as it is that of the court of common pleas, and not the court of last resort.

The Federal compensation act (act May 30, 1908, chap. 236, 35 Stat. at L. 556, Comp. Stat. 1913, § 8923), relating to government employees, does not contain the word "accident" in the principal clause, but provides that compensation shall be granted "if the employee is injured in the course

of such employment." Subsidiary clauses provide for the reporting of "accidents," and otherwise refer to "accidental injuries."

In the latest opinion of the attorney general, being in the case of John Sheeran, where the employee was a laborer engaged in river and harbor construction, and, while engaged in work in the course of his employment, contracted a severe cold which resulted in pneumonia, that officer said: "There is nothing either in the language of the act or in its legislative history which justifies the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary, it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations, not to the effects of the disease."

It has been reiterated under the Federal act that acute lead poisoning is not such an injury as entitles an employee to compensation. Similarly, where a workman suffered from cystitis and prostatitis, which he claimed was the result of overwork, it was held that he was merely suffering from disease, which was not covered by the terms of the Federal act, and compensation was refused. 1 Bradbury, Workmen's Compensation, 2d ed. pp. 342, 343.

We are of opinion that in the Michigan act it was not the intention of the legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents alone.

2. If it were to be held that the act was

intended to apply to such diseases, it would, in so far as it does so, be unconstitutional and in violation of § 21 of article 5 of the Constitution of this state, which provides that "no law shall embrace more than one object, which shall be expressed in its title."

That the act, if it were held to apply to and cover occupational diseases, is unconstitutional in so far as it does so, is shown by the fact that the body of the act would then have greater breadth than is indicated in the title. A careful analysis of the title of the act shows that the controlling words are, "providing compensation for accidental injury to or death of employees." No compensation is contemplated except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for "accidental injury to or death of employees," and the last clause of the title restricts the right to compensation or damages in such cases, "to such as are provided by this act."

The Massachusetts decisions have no bearing upon this branch of the case for two reasons: One is that the titles of the respective acts differ materially; and the other reason is that Massachusetts has no such constitutional provisions as ours above quoted. We have dealt with this question of title too recently to make it necessary to refer to our numerous decisions upon the subject.

For the reasons above given, we are constrained to reverse the order and judgment of the Industrial Accident Board.

### **Annotation—Recovery of compensation for incapacity resulting from disease.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

Whether or not a disease is an "accident" or an "injury," within the meaning of the compensation act, is a question which has caused the courts considerable trouble. Compensation has been sought for diseases suffered independently of any injury by accident, and for diseases suffered in connection with such an injury.

The diseases suffered independently of any accident may be divided roughly into two classes: first, the so-called "industrial" or "occupational" diseases, which are the natural and reasonably to be anticipated result of a workman's following a certain occupation for a considerable period of time, as, for example, lead poisoning; second, diseases which

are the result of some unusual condition of the employment, as, for example, pneumonia following an enforced exposure.

Likewise, diseases suffered in connection with an injury by accident may be divided into two classes: first, diseases which supervene after the injury, and are either the direct result of the accident or increase the incapacity caused by it; second, diseases existing at the time of the injury.

The cases in which compensation has been sought where the workman suffers from a disease are grouped below according to the distinction indicated.

#### **"Occupational" or "industrial" diseases.**

Section 8 and the third schedule of the English act of 1906 expressly provide



for compensation for incapacity resulting from occupational diseases; but, aside from these statutory provisions, the decisions under the English act are unanimous in holding that an occupational disease does not come within the statute.

Various provisions of the statute, particularly the clause requiring notice of the accident to be given to the employer within a specified time, have been held to indicate the legislative intention that there must be a time and place and circumstance to which the injury can be referred. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. (Eng.) 213, [1913] S. C. 549, 6 B. W. C. C. 398, 50 Scot. L. R. 350, 4 N. C. C. A. 899; *Petschett v. Preis* (1915) 31 Times L. R. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44; *Martin v. Manchester Corp.* [1912] W. C. Rep. (Eng.) 289, 106 L. T. N. S. 741, 76 J. P. 251, 28 Times L. R. 344, [1912] W. N. 105, 5 B. W. C. C. 259 (disease contracted by a hospital nurse or attendant while at his work in a hospital held not to be an accident).

A skin disease caused by the workman's hand coming in direct contact with poisonous substances in the course of the employment is not an accident. *Evans v. Dodd* [1912] W. C. Rep. (Eng.) 149, 5 B. W. C. C. 305 (eczematous sores caused by working over carbon bisulphid); *Cheek v. Harmsworth Bros.* (1901; C. C.) 4 W. C. C. (Eng.) 3 (dermatitis contracted in using a strong solution of caustic soda); *Petschett v. Preis* (1915) 31 Times L. R. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44 (dermatitis contracted by use of a dry shampoo by barber's assistant).

Nor is a rash which was pronounced to be a condition of eczema, and which might have been caused by acids used in the employer's bleachery. *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713.

Nor is ptomaine poisoning, contracted by inhaling sewer gas while working around cesspools. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230.

Nor is typhoid fever, contracted while handling sewage. *Finlay v. Tullamore Union* (1914) 48 Ir. Law Times 110, 7 B. W. C. C. 973.  
L.R.A.1916A.

Nor is enteritis, contracted by inhaling sewer gas while working in a sewer. *Broderick v. London County Council* [1908] 2 K. B. (Eng.) 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885.

Lead poisoning is not an "accident." *Steel v. Cammell, L. & Co.* [1905] 2 K. B. (Eng.) 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; *Williams v. Duncan* (1898; C. C.) 1 W. C. C. (Eng.) 123; *Adams v. Acme White Lead & Color Works*, ante, 283.

But lead poisoning has been held to be a "personal injury" within the meaning of the Massachusetts act. *Johnson's Case* (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843.

So, blindness because of optic neuritis, due to poisonous gases from a furnace upon which the injured person was obliged to work, is a "personal injury" within the meaning of the Massachusetts act. *Re Hurle*, ante, 279.

#### — breakdown due to overwork.

A general breakdown from continued overwork is, in a sense, similar to an occupational disease, since the progress is gradual and the result is the natural result of a continuation of the work.

"Waste overrunning repair" has been said not to be an "accident;" consequently an injury in the nature of a general breakdown due to overwork is not an accident within the meaning of the act. *Walker v. Hockney Bros.* (1909) 2 B. W. C. C. (Eng.) 20 (partial paralysis caused by continued use of a tricycle); *Black v. New Zealand Shipping Co.* [1913] W. C. & Ins. Rep. (Eng.) 480, 6 B. W. C. C. 720 (heart failure following a continual strain of overwork); *Paton v. Dixon* [1913] W. C. & Ins. Rep. 517, 50 Scot. L. R. 866, 6 B. W. C. C. 882, [1913] S. C. 1120 (incapacity due to continual strain); *Coe v. Fife Coal Co.* [1909] S. C. 393, 46 Scot. L. R. 328 (cardiac breakdown).

The gradual formation of abscesses caused by the nature of the employment and the position which the workman was obliged to take to perform the work is not an accident. *Marshall v. East Holywell Coal Co.* (1905) 93 L. T. N. S. (Eng.) 360, 21 Times L. R. 494.

#### Disease caused by unusual conditions of work.

A disease contracted as a direct result of unusual circumstances connected with the work, and not as an ordinary or reasonably to be anticipated result of pursuing the work, is to be considered as an

injury caused by accident. *Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 48 *Scot. L. R.* 768, 4 B. W. C. C. 417 (pneumonia caused by inhalation of gas generated by an explosion); *Thompson v. Ashington Coal Co.* (1901) 84 L. T. N. S. (Eng.) 412, 17 *Times L. R.* 345, 84 L. T. N. S. 412 (blood poisoning caused by piece of coal which had worked itself into the knee of the workman).

A disease which results from an enforced exposure while the workman is acting within the scope of his employment is an "accident." *Sheerin v. F. & J. Clayton & Co.* [1910] 2 I. R. 105, 44 *Ir. Law Times* 23, 3 B. W. C. C. 583 (inflammation of the kidneys, caused by being obliged, while at work, to stand in water for a fortnight); *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398, [1913] S. C. 549, 50 *Scot. L. R.* 350, [1913] 1 *Scot. L. T.* 167, 4 N. C. C. A. 899 (pneumonia contracted because the workman was obliged to stand in icy water up to his knees for about twenty-five minutes); *Barbeary v. Chugg* (1914) W. C. & Ins. Rep. (Eng.) 84 L. J. K. B. N. S. 504, 112 L. T. N. S. 797, 31 *Times L. R.* 153, 8 B. W. C. C. 37 (sciatica contracted by a pilot, who, after taking a ketch out of a harbor, jumped into his boat from the ketch, and, in so doing, upset his boat and got wet to the thighs); *Coyle v. Watson* [1915] A. C. (Eng.) 1, 111 L. T. N. S. 347, 30 *Times L. R.* 501, 58 *Sol. Jo.* 533, [1914] W. N. 195, [1914] W. Ins. & C. Rep. 228, 7 B. W. C. C. 259, 83 L. J. P. C. N. S. 307, reversing [1913] S. C. 593, 50 *Scot. L. R.* 415, [1913] W. C. & Ins. Rep. 223, 6 B. W. C. C. 416.

An employee who inhales damp smoke and is drenched with water, and, as a result, contracts lobar pneumonia and dies, may be found to have suffered a "personal injury" within the meaning of the Massachusetts act. *Re McPhee* (1915) — *Mass.* —, 109 N. E. 633.

Compensation is recoverable for incapacity from exposure to which an injured workman was subjected while making his way home in his injured condition. *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. (Eng.) 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 *Times L. R.* 622.

But there can be no compensation for incapacity caused by a chill resulting from a voluntary exposure. *McLuekie v. Watson* [1913] S. C. 975, 50 *Scot. L. R.* 770, 6 B. W. C. C. 850.

Pleurisy following a chill after a canvasser and collector of accounts had become overheated in climbing three flights

of stairs has been held by the Scotch court of session not to be an accident; but this decision is clearly against the weight of authority. *McMillan v. Singer Sewing Mach. Co.* [1913] S. C. 346, [1913] W. C. & Ins. Rep. 70, 50 *Scot. L. R.* 220, 6 B. W. C. C. 345, [1912] *Scot. L. T.* 484. A similar decision by the same court was reversed by the House of Lords in *Coyle v. Watson* (Eng.) supra.

Typhoid fever contracted by an employee in drinking contaminated water furnished to him by his employer is an accident within the meaning of the Wisconsin act, *Vennen v. New Dells Lumber Co. ante*, 273.

The death of a person employed to cut grass on the railroad right of way by infection from poison ivy is accidental within the meaning of the New York statute. *Plass v. Central New England R. Co.* (1915) — App. Div. —, 155 N. Y. Supp. 854.

In *Lovelady v. Berrie* (1909) 2 B. W. C. C. (Eng.) 62, a healthy and steady workman was employed to pick up cotton waste about the decks of a ship, and during the employment was sent to work in a hold. After two hours he came up the ladder of the hold apparently in great pain, and the foreman sent him home. Upon examination there appeared slight marks upon his ribs, after three days pneumonia developed, attributed by the attending doctor to the injury to his side, which culminated about a week thereafter, in his death. The court of appeal held that the death was caused by accident arising out of and in the course of his employment, although how he received the injury was unknown; or, at least, is not revealed in the report of the case.

#### —sunstroke and heat prostration.

Prostration by sunstroke may be found to be an accident. *Morgan v. The Zenaida* (1909) 25 *Times L. R.* (Eng.) 446, 2 B. W. C. C. 19; *Davies v. Gillespie* (1911) 105 L. T. N. S. (Eng.) 494, 28 *Times L. R.* 6, 56 *Sol. Jo.* 11, 5 B. W. C. C. 64.

So, death resulting from a heat stroke may be found to be due to an accident. *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 1 B. W. C. C. 232, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 *Times L. R.* 881, 52 *Sol. Jo.* 713, 42 *Ir. Law Times* 213; *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. (Eng.) 428.

But it has been held that a plumber whose vitality was impaired, and who was engaged on a hot day in laying and



joining pipes in a trench, and suffered a stroke of heat apoplexy, was not injured by accident, although his work required considerable stooping. *Robson v. Blakey* [1912] S. C. 334, 49 **Scot. L. R.** 254, [1912] W. C. Rep. 86, 5 B. W. C. C. 536.

So, where, upon the medical evidence, the arbitrator finds that the heat apoplexy from which a ship's stoker was suffering might have been caused by the heat of the sun or by the heat of the stoke holes, the arbitrator is justified in holding that the evidence will not permit him to draw the inference that the injury was caused by an accident arising out of and in the course of the employment. *Olson v. The Dorset* (1913) 6 B. W. C. C. (**Eng.**) 658.

#### **Disease supervening after injury.**

Although, as a matter of fact, some disease is the immediate cause of the death, it may be found that the "death results from the injury" within the meaning of the English act where the disease supervened after the accident, or was directly caused by the accident. *Dunham v. Clare* [1902] 2 K. B. (**Eng.**) 293, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645, 4 W. C. C. 102, (erysipelas supervened after injury to workman's foot); *Mutter v. Thomson* [1913] W. C. & Ins. Rep. 241, [1913] S. C. 619, 50 **Scot. L. R.** 447, 6 B. W. C. C. 424 (workman suffered from heart failure following two operations, the first of which was performed for the purpose of curing an old injury, but which was necessary in order that the second operation could be properly performed); *Dunigan v. Cavan* [1911] S. C. 579, 48 **Scot. L. R.** 459, 4 B. W. C. C. 386 (pneumonia supervened after injury); *Butt v. Gellyceidrim Colliery Co.* (1909) 3 B. W. C. C. (**Eng.**) 44 (epilepsy caused by piece of skull being embedded in the brain as the result of a blow, although death occurred a year and a half after the blow was received); *Fleet v. Johnson* [1913] W. C. & Ins. Rep. (**Eng.**) 223, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60 (blood poisoning following wound in the thumb); *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. (**Eng.**) 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430, 2 B. W. C. C. 342 (death caused by second administration of anesthetic for performance of second operation necessary to secure full result anticipated by first operation).

And death may be found to be the re-

sult of an injury where such injury left the workman in a debilitated condition and unable to resist a disease subsequently supervening. *Euman v. Dalziel* [1913] S. C. 246, 50 **Scot. L. R.** 143, [1913] W. C. & Ins. Rep. 49, 6 B. W. C. C. 900 (appendicitis and peritonitis supervened after workman had received a severe shaking); *Thoburn v. Bedlington Coal Co.* (1911) 5 B. W. C. C. (**Eng.**) 128 (bronchitis of which workman died only hastened his death).

Increased incapacity caused by the intervention of scarlet fever before the workman had recovered from the accident is referable to the accident. *Brown v. Kent* [1913] 3 K. B. (**Eng.**) 624, 82 L. J. K. B. N. S. 1039, 109 L. T. N. S. 293, 29 Times L. R. 702, [1913] W. N. 258, 6 B. W. C. C. 745.

Where an employee's arm was broken while he was in the defendant's employ, and was treated at a hospital, where the fracture properly united, but there developed an abscess upon the fleshy part of the thumb which resulted in ankylosis of the thumb, making it fundamentally useless, the injury to the thumb was an "injury by accident" arising out of and in the course of the employment. *Newcomb v. Albertson* (1914) 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783.

The supreme court will not reverse the findings of fact that the death of an employee was due to injury arising out of and in the course of his employment where the employee died of pneumonia, and there was expert evidence to the effect that the cause of pneumonia was a hurt or strain of the back, suffered by the deceased about two weeks before his death, although such expert evidence was flatly contradicted by other expert evidence. *Bayne v. Riverside Storage & Cartage Co.* (1914) 181 **Mich.** 378, 148 N. W. 412, 5 N. C. C. A. 837.

Blood poisoning, which is the direct consequence of the accident, is the proximate result thereof, and compensation is recoverable for incapacity or death resulting therefrom. *Great Western Power Co. v. Pillsbury*, ante, 281, (small piece of skin knocked off back of employee's hand and blood poisoning supervened); *Burns's Case* (1914) 218 **Mass.** 8, 105 N. E. 601, 5 N. C. C. A. 635 (injury necessitated employee lying in bed, and bed sore was developed, resulting in blood poisoning); *Thompson v. Ashington Coal Co.* (1901) 84 L. T. N. S. (**Eng.**) 412, 17 Times L. R. 345, 84 L. T. N. S. 412 (blood poisoning caused by a piece of coal which had worked itself into the workman's knee); *Fleet v. Johnson* [1913] W. C. &

Ins. Rep. (Eng.) 223, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60 (blood poisoning followed injury to thumb).

Where a gardener was injured while at work in the garden by a nail passing through his boot and piercing the large toe, and died from tetanus which subsequently set in, it was held that he died from accident arising out of and in the course of his employment, where it was shown that persons working in stables and gardens are peculiarly subject to contract the disease of tetanus in suffering from any wound or cut, although it was not shown that he might not have contracted the disease elsewhere. *Walker v. Mullins* (1908) 42 Ir. Law Times 168, 1 B. W. C. C. 211.

It must be shown, however, that the blood poisoning or other disease from which the workman suffered was the result of an injury arising out of his employment.

Thus, in *Jenkins v. Standard Colliery Co.* (1911) 28 Times L. R. (Eng.) 7, where death was caused by blood poisoning following an abrasion of the skin, compensation was denied upon the ground that there was nothing to show that the abrasion was received in the course of the employment.

So, a workman who cut his finger at home, and subsequently contracted blood poisoning, cannot recover compensation where the poison germ might have been conveyed into the wound in any one of several ways other than the employment. *Chandler v. Great Western R. Co.* [1912] W. C. Rep. (Eng.) 168, 106 L. T. N. S. 479, 5 B. W. C. C. 254.

And the county court judge is not justified in drawing the inference of injury from accident arising out of and in the course of the employment where a collier died of blood poisoning due to an abscess in the knee, and there was no evidence to show how the abscess was caused, except that his work was in a very narrow space, which necessitated his working on his knees. *Howe v. Fernhill Collieries* [1912] W. C. & Ins. Rep. (Eng.) 408, 107 L. T. N. S. 508, 5 B. W. C. C. 629.

The death of a workman from blood poisoning caused by the sting of a wasp while he was driving an engine on his employer's farm is not caused by a risk peculiarly incident to the employment. *Amys v. Barton* [1912] 1 K. B. (Eng.) 40, [1911] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117.

And where it was found that the

wound was healing, and that the blood poisoning was caused by independent intervening cause, no compensation is recoverable for the added incapacity resulting from that intervening cause. *Kill v. Industrial Commission*, ante, 14.

There can be no compensation in the absence of proof that the death resulted from a disease which was caused by the accident. *Woods v. Wilson* [1913] W. C. & Ins. Rep. (Eng.) 569, 29 Times L. R. 726, 6 B. W. C. C. 750; *Taylorson v. Framwellgate Coal & Coke Co.* [1913] W. C. & Ins. Rep. (Eng.) 179, 6 B. W. C. C. 56.

But the fact that a workman who, after receiving an injury, was taken to a hospital, and thereafter was found to be afflicted with pneumonia, subsequently went to his home, contrary to the advice of his doctor, and died two days afterward, does not necessarily preclude a finding that his death resulted from the injury. *Dunnigan v. Cavan* [1911] S. C. 579, 48 Scot. L. R. 459, 4 B. W. C. C. 386.

So, where a workman died four years after the accident, and two doctors said the death was due to the accident, and two others thought the death was not, the county court judge was justified in holding that death did not result from the injury. *Taylorson v. Framwellgate Coal & Coke Co.* (Eng.) supra.

#### **Disease from which workman was suffering at time of injury.**

Compensation is not necessarily barred merely because the workman's impaired physical condition at the time rendered him more susceptible to injury than a normally healthy man. *Ismay v. Williamson* [1908] A. C. (Eng.) 437, 1 B. W. C. C. 232, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 395, 27 Times L. R. 881, 52 Sol. Jo. 713 (heat stroke); *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. (Eng.) 428 (heat stroke); *Golder v. Caledonian R. Co.* (1902) 5 Sc. Sess. Cas. (Scot.) 5th Series 123 (workman suffered from nephritis); *Hughes v. Clover* [1909] 2 K. B. (Eng.) 798, 78 L. J. K. B. N. S. 1057, 101 L. T. N. S. 475, 25 Times L. R. 760, 53 Sol. Jo. 763, affirmed in [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885 (rupture of aneurism of aorta); *Groves v. Burroughes* (1911) 4 B. W. C. C. (Eng.) 185 (previous wound burst while workman was performing his ordinary work); *Trodden v. J. McLennard & Sons* (1911) 4 B. W. C. C. (Eng.) 190 (workman's heart in



such condition that any slight exertion might have caused failure); *Aitken v. Finlayson, B. & Co.* [1914] S. C. 770 [1914] 2 *Scot. L. T.* 27, 51 *Scot. L. R.* 653, 7 *B. W. C. C.* 918 (stroke of apoplexy following unusual exertion); *M'Innes v. Dunsmuir* [1908] S. C. (*Scot.*) 1021 (cerebral hemorrhage; workman's arteries in a degenerate condition); *Broforst v. The Blomfield* (1913) 6 *B. W. C. C.* (*Eng.*) 613 (fireman whose arteries were in a diseased condition suffered apoplectic stroke while raking out the fires); *Doughton v. Hickman* [1913] *W. C. & Ins. Rep.* (*Eng.*) 143, 6 *B. W. C. C.* 77 (heart failure); *Fennah v. Midland G. W. R. Co.* (1911) 45 *Ir. Law Times*, 192, 4 *B. W. C. C.* 440; *Wicks v. Dowell & Co.* [1905] 2 *K. B.* (*Eng.*) 225, 74 *L. J. K. B. N. S.* 572, 53 *Week. Rep.* 515, 92 *L. T. N. S.* 677, 21 *Times L. R.* 487, 2 *Ann. Cas.* 732 (workman fell down hatchway upon being seized with epileptic fits); *Woods v. Wilson* (1915) 84 *L. J. K. B. N. S.* (*Eng.*) 1067, 31 *Times L. R.* 273, [1915] *W. N.* 109, 59 *Sol. Jo.* 348, 8 *B. W. C. C.* 288 (peritonitis caused by perforation of the bowel, although organ was in a weakened and disordered condition due to chronic appendicitis).

"The mere circumstance that a particular man, in doing work arising out of and in the course of his employment, meets with an accident which a perfectly healthy man would not have met with, is no answer at all." *Dotzauer v. Strand Palace Hotel* (1910) 3 *B. W. C. C.* (*Eng.*) 387 (man suffering from a disease of the skin injured by putting his hand into water containing soda and soft soap).

That the consequences of the injury were aggravated by the workman's physical condition at the time the injury was received does not prevent a recovery of compensation. *Lloyd v. Sugg* [1900] 1 *Q. B.* (*Eng.*) 486, 69 *L. J. Q. B. N. S.* 190, 81 *L. T. N. S.* 769, 16 *Times L. R.* 65 (workman had gout in his hand, and jar caused hand to swell).

And where the progress and intensity of a disease are accelerated and aggravated by an accident, compensation will be allowed. *Willoughby v. Great Western R. Co.* (1904; C. C.) 117 *L. T. Jo.* (*Eng.*) 132, 6 *W. C. C.* 28.

So the acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the Massachusetts act. *Re Brightman*, post, 321, *Fisher's Case* (1915) 220 *Mass.* 581, 108 *N. E.* 361 (exertion brought on heart failure where valves of the heart had

been affected because of acute articular rheumatism).

A blow on the head, which in all probability would have caused no serious injury to a normally healthy man, but which caused the death of the workman, who was suffering from an advanced stage of arterial sclerosis, may be held to be an accident. *Milwaukee v. Industrial Commission* (1915) 160 *Wis.* 238, 151 *N. W.* 247.

Compensation is recoverable for incapacity due to accident, although there might also have been incapacity had there been no accident. *Harwood v. Wyken Colliery Co.* [1913] 2 *K. B.* (*Eng.*) 158, 82 *L. J. K. B. N. S.* 414, 108 *L. T. N. S.* 283, 29 *Times L. R.* 290, 57 *Sol. Jo.* 300, [1913] *W. C. & Ins. Rep.* 317, [1913] *W. N.* 53, 6 *B. W. C. C.* 225 (workman was suffering from heart disease).

But no compensation is recoverable in respect to an incapacity primarily caused by a disease or the impaired physical condition of the workman at a time when he is doing his ordinary work in the ordinary way. *Hensey v. White* [1900] 1 *Q. B.* (*Eng.*) 481, 48 *Week. Rep.* 257, 69 *L. J. Q. B. N. S.* 188, 63 *J. P.* 804, 81 *L. T. N. S.* 767, 16 *Times L. R.* 64 (workman ruptured blood vessel while doing ordinary work); *O'Hara v. Hayes* (1910) 44 *Ir. Law Times* 71, 3 *B. W. C. C.* 586 (workman suffered from progressive heart disease and was liable to die at any time); *Swinbank v. Bell Bros.* (1911) 5 *B. W. C. C.* (*Eng.*) 48 (incapacity due to eczematous condition); *Hugo v. Larkins* (1910) 3 *B. W. C. C.* (*Eng.*) 228 (erysipelas); *Kerr v. Ritchie* [1913] S. C. 613, 50 *Scot. L. R.* 434, [1913] *W. C. & Ins. Rep.* 297, 6 *B. W. C. C.* 419 (heart disease coming on while workman was doing his ordinary work); *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 *K. B.* (*Eng.*) 988, 80 *L. J. K. B. N. S.* 769, 104 *L. T. N. S.* 365, 27 *Times L. R.* 282, 55 *Sol. Jo.* 329, 4 *B. W. C. C.* 178 (the workman died of angina pectoris not brought on by any exertion); *Walker v. Lilleshall Coal Co.* [1900] 1 *Q. B.* (*Eng.*) 488, 81 *L. T. N. S.* 769, 69 *L. J. Q. B. N. S.* 192, 64 *J. P.* 85, 48 *Week. Rep.* 257, 16 *Times L. R.* 108 (blistered finger of workman came in contact with red lead); *Spence v. Baird* [1912] S. C. 343, 49 *Scot. L. R.* 278, 5 *B. W. C. C.* 542, [1912] *W. C. Rep.* 18 (advanced heart disease); *Federal Gold Mine v. Ennor* (1910; H. C.) 13 *C. L. R.* (*Austr.*) 276 (cerebral hemorrhage not in any way connected with work).

An accident will not be inferred where

there is no evidence of any strain, and the evidence adduced is equally as consistent with the fact of no accident, as with the fact of an accident. *Barnabas v. Bersham Colliery Co.* (1910; H. L.) 103 L. T. N. S. (Eng.) 513, 55 Sol. Jo. 63 (apoplexy); *Kerr v. Ritchie* (1913) 50 *Scot. L. R.* 434, [1913] S. C. 613, [1913] W. C. & Ins. Rep. 297, 6 B. W. C. C. 419 (heart failure); *Beaumont v. Underground Electric R. Co.* [1912] W. C. Rep. (Eng.) 123, 5 B. W. C. C. 247 (heart disease).

And no compensation is recoverable for incapacity caused by cardiac break-

down which was not due to any sudden strain, but was the natural result of the workman continuing to do work which was too heavy for him to do. *Coe v. Fife Coal Co.* [1909] S. C. 393, 46 *Scot. L. R.* 328.

Whether the death of a miner, seventy-nine years old, who died after having been injured by the fall of a stone from the roof of a mine, was caused by the injury or apoplexy, was held to be a question for the jury, in *Warnock v. Glasgow Iron & Steel Co.* (1904) 6 *Se. Sess. Cas. (Scot.)* 5th series, 584.

W. M. G.

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

JOHN ZAPPALA, Resp.,  
v.

INDUSTRIAL INSURANCE COMMISSION  
OF THE STATE OF WASHINGTON,  
Appt.

(82 Wash. 314, 144 Pac. 54.)

**Master and servant — workmen's compensation act — hernia.**

1. Hernia resulting from a workman's attempting to move a heavy truck in the line of his employment is within the operation of a workmen's compensation act providing compensation for injury resulting from any fortuitous event, as distinguished from disease.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — review by courts — binding effect of Commission's rulings.**

2. Under a workmen's compensation act giving an appeal to the courts from rulings of the Commission, the court is not prevented from determining questions of law as to what injuries are within the operation of the statute, by a provision that the decision of the Commission shall be prima facie correct, or by the principle that the rulings of the Commission upon questions of policy involving the administration of the act shall be upheld.

*For other cases, see Public Service Commissions, in Dig. 1-52 N. S.*

**Trial — interpretation of statute — submission to jury.**

3. An action under the workmen's compensation act, which involves merely the question whether or not the injury is with-

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to whether hernia is an accident or personal injury within the meaning of workmen's compensation acts, see annotation, post, 303.

L.R.A.1916A.

in the terms of the act, should not be submitted to the jury.

*For other cases, see Trial, II. c, 1, in Dig. 1-52 N. S.*

**Appeal — submission of question of law to jury — nonprejudicial error.**

4. Error in submitting a question of law to the jury does not require reversal if the right conclusion was reached.

*For other cases, see Appeal and Error, VII. m, 7, d, in Dig. 1-52 N. S.*

(November 17, 1914.)

**A**PPEAL by the Industrial Insurance Commission from a judgment of the Superior Court for Chehalis County in favor of claimant upon appeal from its action in rejecting his claim for compensation under the workmen's compensation act, for an injury sustained by him. Affirmed.

The facts are stated in the opinion.

Messrs. **W. V. Tanner**, Attorney General, and **John M. Wilson**, Assistant Attorney General, for appellant:

The injury of which the respondent complained was not the result of a fortuitous event within the meaning of the last clause of § 3 of the workmen's compensation act.

*Southard v. Railway Pass. Assur. Co.* 34 Conn. 578, Fed. Cas. No. 13,182; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; *Clidero v. Scottish Acci. Ins. Co.* 29 *Scot. L. R.* 303; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Hensey v. White* [1900] 1 Q. B. 481, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 48 *Week. Rep.* 257, 81 L. T. N. S. 767, 16 *Times L. R.* 64, 2 W. C. C. 1.

Mr. **F. W. Loomis**, for respondent:

The spirit and intent of the industrial insurance act are to include all injuries received by workmen during the course of and as a result of their employment, whatever may be the nature of the injury.



State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 175, 37 L.R.A. (N.S.) 466, 117 Pac. 1106, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Peet v. Mills, 76 Wash. 437, post, 358, 136 Pac. 685, 4 N. C. C. A. 786.

The act defines "injury" as "resulting from some fortuitous event, as distinguished from the contraction of disease."

Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 135, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Ludwig v. Preferred Acci. Ins. Co. 113 Minn. 510, 130 N. W. 5; Railway Officials & E. Acci. Asso. v. Drummond, 56 Neb. 235, 76 N. W. 562.

Hernia unexpectedly occurring in the usual course of one's employment, and as a result of it, is a fortuitous or accidental event for which the respondent is entitled to compensation.

Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 133, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Patterson v. Ocean Acci. & Guarantee Corp. 25 App. D. C. 46; Rodey v. Travelers' Ins. Co. 3 N. M. 543, 9 Pac. 348; Hamlyn v. Crown Accidental Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; Martin v. Travellers' Ins. Co. 1 Fost. & F. 505; Standard Life & Acci. Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49.

Whether or not any certain event was an accident within the meaning of the act is one of fact, and not of law.

Boyd, Workmen's Compensation, § 573; Hodd v. Tacoma, 45 Wash. 436, 88 Pac. 842; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Peterson v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso. 123 Minn. 505, 49 L.R.A. (N.S.) 1022, 144 N. W. 160, Ann. Cas. 1915A, 536; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Buchholz v. Metropolitan L. Ins. Co. 177 Mo. App. 683, 160 S. W. 573; Hilts v. United States Casualty Co. 176 Mo. App. 635, 159 S. W. 771.

Even if respondent was afflicted with pre-disposition to hernia or incomplete hernia, if his violent and unusual exertion in the course of his employment was the immediate cause of completing the hernia, he is entitled to compensation.

Moon v. Order of United Commercial Travelers, 96 Neb. 65, 52 L.R.A. 1203, 146 L.R.A. 1916A.

N. W. 1037; Shaw v. Seattle, 39 Wash. 590, 81 Pac. 1057.

**Morris, J.**, delivered the opinion of the court:

Respondent suffers from a hernia and, claiming to have received it under circumstances entitling him to relief under the workmen's compensation act, filed his claim with the Industrial Insurance Commission. The claim was rejected upon the ground that the hernia complained of was not the result of "some fortuitous event" within the language of the act. Respondent then appealed to the lower court where, over the objection of the Commission, the case was submitted to a jury to determine whether or not the injury was such as fell within the act. Verdict was returned for respondent, and the Commission appeals.

The determinative question arises under § 3 of the act, (Laws 1911, p. 346, 3 Rem. & Bal. Code, § 6604—3), providing that (p. 349) "the words 'injury' or 'injured,' as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease."

The respondent was in the employ of a coeprage company, and on the day of the alleged injury was pushing a heavily loaded truck. The language of the respondent in describing the circumstances under which the injury was received was: "That the car ran harder than usual, and he tried three or four times to start it, but could not move it. Then he put all his strength into it, gave a jerk and hurt himself; felt a sudden pain; could not move for a little while; put his hands where he felt the hurt and called for help; looked at himself and saw a swelling, a small lump where he was hurt; that he had never had any pain there before or any previous rupture."

There was other corroborative evidence. It is the contention of the Commission that these circumstances do not disclose that the injury resulted from "a fortuitous event," and that no accident occurred which produced the injury, contending that, inasmuch as respondent did not slip or fall, nothing struck him, and nothing happened out of the ordinary which produced the rupture or hernia, it cannot be said that the hernia resulted from some fortuitous event. "Fortuitous" is defined as: "Occurring by chance as opposed to design; coming or taking place without any cause; accidental; casual;" and a fortuitous cause is said to be "a contingent or accidental cause." Standard Diet.

In construing the language of the act we must have in mind the evident purpose and intent of the act to provide compensation for workmen injured in hazardous undertakings, reaching "every injury sustained by

a workman engaged in any such industry, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received" (State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599, 117 Pac. 1101, and that the act should be liberally interpreted to the end that the purpose of the legislature, in suppressing the mischief and advancing the remedy, be promoted even to the inclusion of cases within the reason although outside the letter of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees regardless of the cause of the injury. Peet v. Mills, 76 Wash. 437, post, 358, 136 Pac. 685, 4 N. C. C. A. 786. The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the Commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, is too refined to come within the policy of the act as announced by the legislature in its adoption, and the language of the court in its interpretation. The machine and the man are within the same class as producing causes, and any injury resulting from the sudden giving way of the one, while used as a part of any industry within the act, is as much within the contemplation of the act as the other. When the appellant admits that the breaking of the truck because of the application of unusual force, with resultant injury to the workman, is covered by the act, then it must admit that the tearing of muscles or the rupture of fibers, or whatever it is that causes hernia, while exercising unusual effort, is likewise covered by the act; for there can be no sound distinction between external and internal causes arising from the same act and producing the same result. In Boardman v. Scott, 3 W. C. C. 33, a case arising out of the British workmen's compensation act, it was held that an internal injury caused to a person in a normal state of health was a fortuitous and unforeseen event, in a case where a workman, while lifting a heavy beam, suddenly tore several fibers of the muscles of his back. In Purse v. Hayward, 125 L. T. Jo. 10, 1 B. W. C. C. 216, it was likewise held that a workman in his master's field, who, finding that the grain had been trodden down by bullocks, stooped to raise it and sprained his left leg, was within the remedies of the L.R.A. 1916A.

same act. The language of the British act is "personal injury by accident arising out of and in the course of employment." The English cases make no distinction between an accident and a fortuitous event as used in our act, for they say in the case above cited, in answering the contention there made that an injury, to be within the British act, must be caused by some fortuitous and external event, that "the word 'accident' is a popular word of very wide meaning. Originally a grammarian's word, it has been used from Dr. Johnson's time until to-day, to mean 'that which happens unforeseen, casualty, chance.' For four years this man had successfully used these muscles to lift this weight; owing, perhaps to carelessness, perhaps to a slip, perhaps to some other cause, except disease, he snaps the fibers of the muscles that had always successfully done the work, and if any ordinary person had been asked what had happened to him, he would have said that the man had had an accident, and I think the word would have been rightly used. To me it is the same as if he had been using a rope strong enough for the purpose, and by overstrain or sudden jerk the rope had snapped and the beam had fallen upon him. That would be an accident. In one case the work is done by a rope; in the other by a set of muscles. In each case the machinery is normally fit for the work, but the unexpected happens, and the rope or muscle snaps and there is an accident. To my thinking, there is in the word 'accident' always an element of injury. . . . As to the word 'fortuitous,' I do not think I need trouble much about it. If the injury were caused by disease, it is clear that the applicant could not recover; but I find as a fact the man was not in any way diseased. Indeed, it was not seriously contended that he was. 'Fortuitous' means 'accidental,' 'casual,' 'happening by chance;' and I have already said that, in my opinion, this injury was caused by an accidental and fortuitous event."

So that, so far as concerns the class of injuries for which acts of this character provide compensation, no sound distinction can be made between those resulting from accident and those resulting from some fortuitous event. The above reasoning is that employed by the county judge. Upon appeal (Boardman v. Scott, 85 L. T. N. S. 502) the judgment was affirmed, the court saying: "In determining the question whether the injury has been caused by an 'accident' or not, we must discriminate between that which must occur and that which need not necessarily occur in the course of the employment. If the thing must happen,



it is not an accident, but if it need not happen, then there is the fortuitous element and there is an accident."

*Fenton v. Thorley* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1, another English case, arose out of these circumstances: The workman, while turning a wheel attached to a press, "suddenly felt something which he describes as a tear in his inside, and upon examination it was found that he was ruptured. There was no evidence of any slip, wrench, or sudden jerk." It was held below, following *Hensy v. White* [1900] 1 Q. B. 481, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 48 Week. Rep. 257, 81 L. T. N. S. 767, 16 Times L. R. 64, 2 W. C. C. 1, relied upon by appellant, that there could be no recovery because of "an entire lack of the fortuitous element." This contention was overruled, and it was said that the word "accident," as used in the British act, was used in its popular ordinary sense as denoting an unlooked-for mishap or an untoward event which is not expected or designed. Reference is made to *Stewart v. Wilson & C. Coal Co. Sc. Sess. Cas. 5th series, 120*, where a miner strained his back in replacing a derailed coal hutch, and the question arose, Was it an accident within the meaning of the act? All the judges held that it was and that when "a workman in the reasonable performance of his duties sustains a physical injury as a result of the work he is engaged in, this is accidental injury in the sense of the statute. If such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it."

*United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, and *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, are cited in support of the holding. Both of these are accident insurance cases. In the first, a man was fatally injured in jumping off a platform. In the second, an accidental strain resulted in death. The opinion in each case was that death resulted from an accidental injury within the meaning of the policy. These two cases, so cited by the English court, have been approvingly cited by this court in *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028, where it was held that a violent dilation of the heart, resulting in death, caused by lifting a heavy weight, was within the provision of an accident policy covering accidents caused solely by external, violent, and accidental means. In *Timmins v. Leeds Forge Co.* 16 Times L. R. 521, it was held that a workman who ruptured him-

self owing to the difficulty of lifting a plank frozen to another plank was within the British act, the court saying the evidence showed the injury to be "fortuitous and unexpected."

The American cases arising out of acts of this character sustain our conclusion that there is no distinction between the accident and a fortuitous event. In *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585, it is said, in defining the word "accident" as used in the New Jersey act: "An 'accident' is an unlooked-for mishap or untoward event which is not expected or designed," citing *Fenton v. Thorley*, supra. In *Re Murray*, Ops. Sol. Dept. Commerce & Labor, p. 201, it is held that a rupture of the internal organs, due to the change between high and normal atmospheric pressure, was an accident. In *McGuigan v. Maryland Casualty Co.*, the Massachusetts Industrial Accident Board holds that, where a carpenter strained himself moving a heavy radiator, he was within the act granting compensation for personal injuries sustained in the course of employment. In *Gross v. Marshall Butters Lumber Co.*, the Michigan Industrial Accident Board, October 15, 1913, holds that a workman suffering "severe straining of lumbar muscles and bruising of the third and fourth vertebrae" was entitled to compensation under a classification similar to that in the Massachusetts act. The above cases are collated in 1 *Bradbury's Workmen's Compensation*, 367. It seems to us it is not necessary to go further in support of our ruling that the injury to the respondent resulted from a fortuitous event within the meaning and intent of our act.

Section 20 of our act (Laws 1911, p. 368) provides that "in all court proceedings under or pursuant to this act the decision of the Department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." 3 Rem. & Bal. Code, § 6604-20.

It is now contended that respondent has not sustained the burden of proof cast upon him by the law in seeking to overrule the decision of the Insurance Commission. There is no dispute as to the facts resulting in the injury, so that we are not called upon to review any decision reached by the Commission on disputed facts. The question is rather one of law in determining the proper interpretation of the act as applied to the undisputed facts.

The appellant also suggests that the court ought not to disturb the rulings of the Commission upon questions of policy involving the administration of the act, and that the Commission, having adopted certain rules for their government in these cases,

should be upheld in their observance. In so far as the Commission has adopted any rules that pertain to the administrative features or those matters that are peculiarly within the control of the Commission, the courts, we apprehend, will recognize its right to do so. But this does not mean that in our interpretation of the true intent and purpose of the act on a pure question of law we are bound by any ruling of the Commission. If so, there would be no purpose in the appeal to the courts provided by the act. Whenever the Industrial Insurance Commission interprets the law, that interpretation is reviewable in the courts, and while in any given case, as in this, the courts will give due respect to the rulings of the Commission, they must finally act upon their own determination as to what the law means and the extent to which it is applicable. The rules adopted by the Commission governing hernia cases are: (1) There must be an accident resulting in hernia; (2) the hernia must have appeared just following the accident; (3) there must have been present pain at the time; (4) the applicant must show that he did not have hernia before the accident;

(5) hernia coming on while a man is following his usual work is not an accident. We see no difficulty in sustaining a recovery under these rules, the evidence in our judgment meeting every requirement here made. The evidence takes the case out of the fifth rule, showing, as we have held, that the hernia in this case resulted from a fortuitous event or accident, and is not one appearing while the workman was following his usual work, without accident or fortuitous event to which the result might be directly traceable.

The only error we find in the record is the sending of the case to the jury. The case, calling for an interpretation of the language of the act upon undisputed facts, was one of law for the court. But, inasmuch as the jury has reached the proper conclusion, we do not feel that we would be justified in holding this error so prejudicial as to require a reversal of the judgment and the ordering of a new trial.

The judgment is sustained.

Crow, Ch. J., and Gose, Chadwick, and Parker, JJ., concur.

## WEST VIRGINIA COURT OF APPEALS.

GAETANO POCCARDI, Royal Consul of Italy, in Behalf of the Dependent of Caltalo Greco, Deceased, Appt.,  
v.

PUBLIC SERVICE COMMISSION, Respt.

(— W. Va. —, 84 S. E. 242.)

### Appeal — from Public Service Commission — questions open.

1. Under its supervisory power over the Public Service Commission respecting its administration of the workmen's compensation act this court takes cognizance of the questions of law only.

*For other cases, see Appeal and Error, VII. 1, 4; Public Service Commissions, in Dig. 1-52 N. S.*

### Same — sufficiency of evidence.

2. In the absence of conflict in the evidence adduced to show a claimant's right to participation in the workmen's compensation fund, the Commission is regarded, in this court, as a demurrant to the evidence, and if the evidence would sustain a verdict

of a jury in favor of the claimant, the claim is regarded as sufficiently proved.

*For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.*

### Public Service Commission — claim for injury — inferences.

3. It is the duty of the Commission under such circumstances, to give the claimant the benefit of inferences arising in his favor from the facts proved, in the absence of direct evidence.

*For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.*

### Master and servant — workmen's compensation — rupture.

4. A rupture caused by a strain while at work is an accident or untoward event arising in the course of employment, and compensable under the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Evidence — injury — sufficiency.

5. Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment, within the meaning of said act.

*For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.*

(January 26, 1915.)

Headnotes by POFFENBARGER, J.

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to whether hernia is an accident or personal injury within the meaning of the workmen's compensation acts, see annotation, post, 303.  
J.L.R.A.1916A.

**A** PPEAL by petitioner from an order of the Public Service Commission reject-



ing a claim for compensation under the workmen's compensation act, to the widow of Cataldo Greco, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Francis Rawle and Joseph W. Henderson, for appellant:

A court may draw an inference from proved facts where there is no direct evidence of the cause of death.

Bender v. The Zent [1909] 2 K. B. 41, 78 L. J. K. B. N. S. 533, 100 L. T. N. S. 639; Mitchell v. Glamorgan Coal Co. 23 Times L. R. 588, 9 W. C. C. 16; Clover v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885 [1910] W. N. 73, 3 B. W. C. C. 275.

The injury was received in the course of and resulted from the employment.

Fenton v. Thorley [1903] A. C. 443, 5 W. C. C. 1, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684.

Messrs. A. A. Lilly, Attorney General, and Frank Lively, Assistant Attorney General, for respondent:

The conclusion of the Commission after weighing the evidence is entitled to peculiar weight, and should not be lightly set aside.

Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

The burden of proof is upon the claimant to produce evidence from which the conclusion can be legitimately drawn that the injury was received in the course of employment.

Howe v. Fernhill Collieries [1912] W. C. Rep. 408, 107 L. T. N. S. 508, 5 B. W. C. C. 629.

Poffenbarger, J., delivered the opinion of the court:

Gaetano Poccardi, royal consul of Italy, on behalf of the widow of Cataldo Greco, an Italian subject, and his sole dependent, complains of an order of the Public Service Commission rejecting her claim against the workmen's compensation fund.

Though a surgical operation for strangulated hernia precipitated Greco's death, the legally proximate cause thereof was the hernia. But, in the opinion of the Commission, the hernia did not result from accidental injury. Just before his death, Greco was an employee of the Phillips Sheet & Tin Plate Company at Weirton, West Virginia. On the 10th day of April, 1914, he and some of his fellow workmen lifted a heavy iron pipe called a "jim pole." He worked the next day, but illness required him to go to bed on Sunday, the second day after the exertion to which reference has been made, where he remained until April 14, 1914, without attention from a physician. On L.R.A.1916A.

that day, Dr. L. A. Whittaker was called. Finding his condition serious, the doctor had him removed to a hospital on the 15th, performed the operation on the 16th, and the patient died on the 20th. A post mortem examination made on the day of the death revealed dilatation of the right ventricle of the heart as the immediate cause of death; the wound showing no unfavorable indications. Weakness of the heart had been observed while he was on the operating table.

Loney Marino, a fellow workman, says Greco, after carrying the "jim pole" to the machine shop, had thrown his hands back to his hips as though he had injured himself. The man who had charge of the men engaged in the removal of the pipe and the labor boss at the plant say neither of them heard any complaint of injury. A verified certificate of the chief clerk of the company for which Greco had worked says he "strained himself" in carrying the pipe, and "first complained of his injury in machine shop." It further says "to the best of" affiant's knowledge "the injury causing death was sustained in the course of the deceased's employment." A report of the attending physician says the hernia and strangulation were "brought on by lifting jim pipe in mill, overworking." He further reports specifically that the disability was due to the accident previously mentioned by him, and that Greco had not been maimed or crippled by previous injury.

After the claim had been rejected, the applicant filed a letter from Dr. Whittaker, directed generally to whom it may concern, saying Greco had been injured in the course of his employment. He further said that, at the time of his investigation, he had understood him to say, through an interpreter, that he had been ruptured previously, but was now assured by the interpreter that he had misunderstood him. This seems to have been considered as upon an application to reopen or rehear the case. The Commission was notified that several persons who had known the decedent were ready to testify to his previous good health. A joint affidavit of these persons to the fact, and also one made by three other persons to the effect that he had complained of abdominal discomfort immediately after the lifting of the pipe, seem to have been taken, but, if so, they were not filed with the Commission at any time, nor in this court. What purport to be copies of such affidavits appear only in the brief of counsel for the petitioner. If such affidavits exist, it is not perceived how they can be considered here; they never having been filed in the proceeding in any manner or at any stage thereof.

Meager development of the merits of the case before the Commission justifies, in the opinion of some of the members of the court, refusal of the prayer of the petitioner. No doubt the operating surgeon could have determined whether the rupture was an old one or the result of disease, or a fresh wound occasioned by a strain. As to the appearance of the wound, no inquiry seems to have been propounded to him, wherefore the evidence lacks detail and particularity, which no doubt could have been supplied. One or more of the members of the court entertain the view that the evidence is defective in form and character, justifying rejection on the ground of failure on the part of the applicant to develop the facts. A further suggestion is that the finding of the Commission is of equal dignity with the verdict of a jury, and cannot be disturbed unless plainly wrong.

The action of the Commission is final and irreviewable, except as to matters "going to the basis of the claimant's right." Code chap. 15p, § 43, serial § 699. As to such matters, its function is administrative, only quasi judicial, and the supervisory power of this court over its action respecting the right of the claimant is under its original jurisdiction by mandamus. *De Constantin v. Public Service Commission*, — W. Va. —, post, 329, 83 S. E. 88. In this respect, our statute accords with the English compensation act and those of several of the states, limiting the power of review to questions of law. *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42; *Turner v. Bell*, 4 B. W. C. C. 63; *Moss v. Akers*, 4 B. W. C. C. 294; *Illinois act* (*Hurd's Rev. Stat.* 1913, chap. 48) § 19; *Iowa act* (*Acts 35th Gen. Assem. chap. 147*) § 34; *Massachusetts act* (*Stat.* 1911, chap. 751) pt. 3, §§ 10, 11; *Michigan act* (*Pub. Acts 1912, No. 10*) pt. 3, §§ 11, 12, 13; *Minnesota act* (*Gen. Stat.* 1913, §§ 8216, 8225) §§ 22, 30; *Bradbury, Workmen's Compensation*, chap. 16, pp. 892 et seq.

Under the English act, the courts regard the employer, whose place, under our statute, the Commission takes, as a demurrant to the evidence, when the issue is one of mere sufficiency thereof. If the evidence adduced or the facts found or disclosed are uncontradicted, and would sustain a verdict of a jury in favor of the claimant, there is liability as a matter of law, and legal duty to pay the claim arises. *Mitchell v. Glamorgan Coal Co.* 23 Times L. R. 588; 9 W. C. C. 16; *Wright v. Kerrigan* [1911] 2 I. R. 301, 45 Ir. Law Times, 82, 4 B. W. C. C. 432; *The Swansea Vale v. Rice*, 104 L. T. N. S. 658, 27 Times L. R. 440, 55 Sol. L. R. A. 1916A.

*Jo.* 497, 48 Scot. L. R. 1095, 4 B. W. C. 298. What rule would govern in a case of conflicting evidence, it is unnecessary to say, since the evidence adduced here is free from conflict. All of it points in the same direction, and the only question is the weight to which inferences arising from the facts are entitled.

The written opinion adopted by the Commission rests largely upon the sound legal proposition that evidence giving rise to inferences consistent with the theory of liability and inconsistent therewith, in equal degree, is insufficient. An illustration of such evidence is found in *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 K. B. 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178. A workman whose heart was shown to have been in bad condition collapsed while at work, and died of angina pectoris. The court held the two facts (collapse while at work and disease of the heart) rendered the cause of death uncertain; the inferences arising being equally consistent with the theory of death from accident and death from disease. A collier having highly diseased arteries, threatening apoplexy at any time and under any conditions, was attacked with apoplexy while at work, and died. Here likewise the court held the evidence insufficient. *Barnabas v. Bersham Colliery Co.* 102 L. T. N. S. 621, 3 B. W. C. C. 216. There were like holdings in the case of a man who had undergone two successive surgical operations (amputation of a finger injured while at work, and another for a diseased tooth) and died from the effect of the anesthetics (*Charles v. Walker*, 25 Times L. R. 609, 2 B. W. C. C. 5), and a sailor found dead in the water in the morning, after having gone on deck, late at night, to get fresh air (*Davis v. Hill's Plymouth Colliery*, 3 B. W. C. C. 514). In each of these cases, directly contradictory inferences arose from facts proven.

In the absence of such contradiction, however, the probability arising from the facts disclosed governs and concludes. A night workman who had gone to his work, a mile or more distant, in the evening, sound and well, came back in the morning at the usual hour, in his working clothes and with a finger crushed and bleeding, unwashed, and wrapped in a rag. Continuing his work, blood poison set in, and he died. The county judge held his widow had not proved a case, and said the accident might have occurred in the walk from the colliery. But the appellate court, reversing, said: "The workman was engaged in work at which accidents do happen, and the probability therefore is that the accident happened at



the time when he was so engaged, rather than at a time when, in the ordinary course of life, such accidents do not happen. There is nothing to suggest here that the accident happened on the way home." *Mitchell v. Glamorgan Coal Co.* cited.

A man whose duty it was to lift coffins went to work apparently well, and, on returning, complained of having been hurt and had marks on his side and chest and a swollen leg. He died about a week later of pneumonia superinduced by the injury. There was no proof as to how he was injured, except a statement to his physician that he had "met with an accident by moving a coffin." The court, in dismissing the appeal, said: "So far we have, at any rate, the fact that one coffin went out, and that it would be the duty of the deceased to assist in removing it, and the doctor's evidence is consistent with the fact that something like a coffin fell upon him. . . . This man, whose employment was lifting coffins, went out well, and came home, as we have heard, with marks and injuries upon him. In these circumstances, it strikes me that the inferences drawn in the Glamorgan Case may be drawn here. In that case the man's finger might have been crushed in many ways." *Wright v. Kerrigan*, cited.

This principle applies as well to the ascertainment of the times and causes of internal injuries, such as ruptures. Here, as in many other instances in the administration of the laws, the right is not susceptible of complete and certain demonstration, and probability, which, *ex vi termini*, is evidence, must take its place as inconclusive, but nevertheless dependable, proof. In one of the most notable English cases decided apparently by the House of Lords, the decision of the county judge, denying right of compensation for a rupture, affirmed by the court of appeal, was reversed and the case remanded for ascertainment of the amount of compensation. *Fenton v. Thorley*, 5 W. C. C. 1. In that case Lord Lindley said: "The personal injury was the rupture. The cause of it was the unintended and unexpected resistance of the wheel to the force applied to it. . . . The proximate cause may be an internal strain."

In *Fulford v. Northfleet Coal & Ballast Co.* 1 B. W. C. C. 222, compensation for injury by rupture was awarded to a man who had a previously existing rupture, on the theory that it had been so increased by a strain as to incapacitate him. The court said: "I think, regarding the case solely from the medical aspect, the injury could not have been an untoward event not expected. On the other hand, the man had worked in the chalk quarry for six months

and had dug out lumps of chalk quite as large as the one in question without injury, notwithstanding the strain he was suffering from, and, as far as he or anyone without medical or surgical knowledge was concerned, the injury was occasioned by means of a mishap or untoward event not expected or designed."

In *Scales v. West Norfolk Farmers' Manure & Chemical Co.* [1913] W. C. & Ins. Rep. 165, 6 B. W. C. C. 188, it appeared the deceased had been ruptured three or four years before the strangulation causing his death, but the court held a strain or over-exertion in the course of employment was the proximate cause of death and an accident, within the meaning of the act. *Brown v. Kemp* [1913] W. C. & Ins. Rep. 595, 6 B. W. C. C. 725, was a similar case, and in it compensation was awarded.

Responding to medical criticism of the theory of rupture by strain or exertion, the Washington Industrial Insurance Commission has adopted rules requiring proof in cases of claims predicated on hernia: (1) That its origin was recent; (2) that it was accompanied by pain; (3) that it was immediately preceded by accidental strain in hazardous employment; and (4) that it did not previously exist. Similar rules have been adopted by the Commission. Notwithstanding the criticism calling forth these rules, they impliedly admit possibility and probability of rupture from a strain, when the strain and the rupture are in close relation. So does an article by the attorney for the Michigan Compensation Board, published in the *National Compensation Journal*, brought to our attention by the brief for the Commission. Both the rules and the thesis admit the English proposition that an internal injury resulting from a strain while at work is an accident, within the meaning of the act, and their limitations or restrictions upon proof of the fact have not been judicially approved.

Under the decisions to which reference has been made, the circumstances stated, if sufficiently proved, make out a *prima facie* case of right to participation. Greco had worked for his employer more than two months. There is no proof of any antecedent infirmity of any kind on his part. In his employment, he was subjected to unusual physical exertion on Friday. He took to his bed on Sunday, and his ailment proved to be hernia. The surgeon who operated upon him and saw the rupture had no personal knowledge of the exertion, but was informed as to that fact. If a competent physician and surgeon, he was likely able to tell, from his inspection, whether the rupture was of recent origin. Having inspected it, and knowing from others what the

patient had previously done, he gave it, as his opinion, that the injury had resulted from strain in lifting the pipe. Support of his conclusion is found in the known facts, previous ability to work, the exertion, and the rupture. Failure of the injury to cause serious discomfort until the second day after its occurrence does not negative the inference arising from these facts. "Sometimes there is complete absence of pain and tenderness in the hernia itself." *Enc. Britannica*. The article brought to our attention in the brief says traumatic hernia completely develops immediately or in a day or two after the blow. Common sense suggests that a rupture from a strain might develop more slowly than one caused by a blow.

The case has been very poorly developed. No effort by the applicant strictly to prove the claim was made until after its rejection. He relied upon the result of the Commission's investigation, and apparently was not advised of the supposed insufficiency of the evidence before the finding and announcement of the result. Then, although an informal rehearing seems to have been allowed, no new evidence of consequence was filed. The suggestion here of additional proof is utterly futile. However, the facts disclosed by the record establish the claim.

Accordingly an order will be entered requiring the Commission to ascertain the amount of the indemnity and cause it to be paid.

### **Annotation—Hernia as an "accident" or "personal injury" within the meaning of the compensation act.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

All of the cases now take the position that a hernia caused by a strain or exertion of some kind while the workman is acting within the scope of his employment is an "accident" or a "personal injury" within the meaning of the compensation acts, for which compensation is recoverable.

In addition to *POCCARDI v. PUBLIC SERVICE COMMISSION* and *ZAPPALA v. INDUSTRIAL INS. COMMISSION* the question has been passed upon by but one other American court.

Thus, a workman's death may be found to be due to an accident where, although there was some evidence pointing to cancer, a rupture occurred while the workman was in the very act of doing some heavy work; namely, furrowing heavy posts, by pushing them forward against the knives of a machine by pressing his abdomen forcibly against the end thereof. *Voorhees v. Smith Schoonmaker Co.* (1914) 86 N. J. L. 500, 82 Atl. 280, 7 N. C. C. A. 646.

The decision by the House of Lords in *Fenton v. J. Thorley & Co.* [1903] A. C. (Eng.) 443, 72 L. J. K. B. N. S. 87, 52 Week. Rep. 81, 89 L. T. N. S. 513, 9 Times L. R. 684, 5 W. C. C. 1, that a rupture caused by overexertion in attempting to turn a wheel is an accident, settled the question under the English act.

Some of the earlier decisions in England were to the contrary; but these must now be considered as overruled. *Roper v. Greenwood* (1901) 83 L. T. N. L.R.A.1916A.

*S. (Eng.)* 471; *Perry v. Baker* (1901; C. C.) 3 W. C. C. (Eng.) 29.

A rupture caused by the effort of separating a plank from one to which it was stuck by ice formed during the preceding night may properly be found to have been caused by accident. *Timmins v. Leeds Forge Co.* (1900) 16 Times L. R. (Eng.) 521, 83 L. T. N. S. 120.

Compensation is recoverable for incapacity caused by hernia, although the workman had previously suffered from a slight hernia, and the accident in question merely aggravated its consequences. *Brown v. Kemp* (1913) 6 B. W. C. C. (Eng.) 725; *Fulford v. Northfleet Coal & Ballast Co.* (1907; C. C.) 1 B. W. C. C. (Eng.) 222.

Where a workman suffered an accident which caused a rupture and necessitated an operation, and at the time of the operation an old hernia was also operated upon, and the workman died eight months after, having shown signs of heart failure soon after the operation, the arbitrator may find that the death resulted from the accident, where the medical evidence indicated that in order properly to operate for the second rupture, the first one must also be operated for. *Mutter v. Thomson* (1913) W. C. & Ins. Rep. 241, [1913] S. C. 619, 50 Scot. L. R. 447, 6 B. W. C. C. 424.

A man employed as a stoker, who had been ruptured three or four years before, and was wearing a truss sufficient to prevent strangulated hernia under ordinary circumstances, who left home well and in excellent spirits, and shortly after his return to work was found to be in great agony, and died shortly afterward from



strangulated hernia, may be found to be suffering from injury by accident arising out of the employment, although there was no evidence as to how the hernia came down so as to strangle, nor of

any specially heavy work done by the deceased to account for it. *Scales v. West Norfolk Farmers' Manure & Chemical Co.* (1913) W. C. & Ins. Rep. (Eng.) 165, 6 B. W. C. C. 188. W. M. G.

# MASSACHUSETTS SUPREME JUDICIAL COURT.

RE ALMA REITHEL, Widow of Erhardt Reithel, Employee.

PONDVILLE WOOLEN MILLS, Employer.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited, Appt.

(— Mass. —, 109 N. E. 951.)

## Master and servant — workmen's compensation act — injury by bullet.

Injury inflicted upon the superintendent of a mill, whose duty is to order trespassers from the premises, by a shot fired by a trespasser to whom he gives such order, arises out of and in the course of his employment within the operation of a workmen's compensation act; at least, where he has received special instructions from a superior to order out the trespasser in question and call the police to his assistance.

For other cases, see *Master and Servant, II. a*, in *Dig. 1-52 N. S.*

(October 18, 1915.)

**A**PPEAL by the insurer from a decree of the Superior Court for Worcester County in petitioner's favor upon a finding of the Industrial Accident Board affirming a finding of the Committee of Arbitration in a proceeding by petitioner under the workmen's compensation act to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Messrs. Charles C. Milton and Frank L. Riley for appellant.

Messrs. Thayer, Drury, & Walker, for appellee:

The industrial accident board was warranted in finding that the injury to Reithel arose out of his employment.

McNicol's Case, 215 Mass. 497, post, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 100 L. T. N. S. 8, 25 Times L. R. 632, 2 B. W. C. C. 35; *Barnes v. Nunnery Colliery Co.* [1910] W. N. 248, 45 L. J. N. C. 757, 4 B. W. C. C. 43;

**Note.**—As to the construction and application of the workmen's compensation acts generally, see annotation, ante, 23.

As to whether compensation is recoverable for incapacity caused by an assault, see annotation, post, 309. L.R.A.1916A.

*Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, 7 B. W. C. C. 1; *Fitzgerald v. Clarke* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 510, 90 L. T. N. S. 611, 52 Week. Rep. 451, 68 J. P. 409, 20 Times L. R. 429, 6 W. C. C. 11; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *State ex rel. Duluth Brewing & Malting Co. v. District Ct.* 129 Minn. 176, 151 N. W. 912; *Hopkins v. Michigan Sugar Co.* — Mich. —, post, 310, 150 N. W. 325; *Anderson v. Balfour* [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. C. C. 588; *Trim Joint Dist. School v. Kelly* [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 30 Times L. R. 452, 111 L. T. N. S. 305, 48 Ir. Law Times, 141, 58 Sol. Jo. 493, 7 B. W. C. C. 274; *Manson v. Forth & C. S. S. Co.* [1913] S. C. 921, 50 Scot. L. R. 687, 6 B. W. C. C. 830; *Shaw v. Macfarlane*, 52 Scot. L. R. 236, 8 B. W. C. C. 382; *Bett v. Hughes*, 52 Scot. L. R. 93, 8 B. W. C. C. 362; *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247; *Brightman's Case*, 220 Mass. 17, post, 321, 107 N. E. 527, 8 N. C. C. A. 102; *Sponatski's Case*, 220 Mass. 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025; *Blair & Co. v. Chilton* [1915] W. N. 203, 84 L. J. K. B. N. S. 1147, [1915] W. C. & Ins. Rep. 283, 31 Times L. R. 437, 8 B. W. C. C. 324; *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507; *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486; *Thorn v. Humm* [1915] W. C. & Ins. Rep. 224, 112 L. T. N. S. 888, 31 Times L. R. 194, 8 B. W. C. C. 190.

**Rugg, Ch. J.**, delivered the opinion of the court:

The deceased employee, Erhardt Reithel, was employed as superintendent of a woolen mill. It was a part of his duty to order from the premises of the subscriber any person or persons who entered without permission. During his employment he had directed a considerable number of such

people to leave the mill. One Bombard entered the premises of the subscriber without permission in June, 1914, interviewed and annoyed an employee named Mrs. King, and created a disturbance. Reithel as superintendent ordered him to leave, and he did as directed. This occurrence was reported to the manager of the mill, who instructed Reithel, if Bombard again appeared on the premises to order him out, and if he did not go, to send for the police authorities. The finding of the industrial accident board proceeds as follows: "Bombard appeared again on July 9, 1914, having a revolver in his possession, and engaged Mrs. King in conversation. He finally threatened Mrs. King with the revolver and she sent another employee, Provost, to the superintendent with a request that Bombard be ordered from the premises. In this connection, the evidence shows that a daughter of the superintending employee also informed him that Bombard had a revolver and was going to shoot Mrs. King. 'For God's sake, go and tend to that man,' she urged. The superintendent thereupon walked towards Bombard, made a motion towards the door, directing him to go out. Bombard immediately discharged the revolver at the superintendent, fatally injuring him, and afterwards shot at the employee's daughter and Mrs. King.

This finding presents a case of wholly unprovoked murder. The question is whether this personal injury was one "arising out of and in the course of" the employment of Reithel. Plainly it arose in the course of his employment. It came upon him while he was doing his duty in the place and manner required by his contract of hire.

The only point of difficulty is whether it also arose out of the employment. The Industrial Accident Board has found that it did. The facts are not in dispute. The question to be decided is whether as matter of law this finding was erroneous.

The employee was the superintendent of a mill. It was a part of his general duty to order trespassers from the premises. In this respect he was required to deal with those more or less heedless of the rights of others in their conduct. Superimposed upon this general obligation resting on him by reason of his contract of employment was a special one respecting Bombard. It came into existence because Bombard on some occasion within a few weeks before the event in question had been upon the premises of the employer. He had come as a trespasser, he had annoyed a woman employee, and he had created a disturbance. It thus had appeared that he was a disorderly person. His conduct on that occa-

sion was of sufficient importance to form the subject of a report by the superintendent to his superior, the manager of the factory. In view of these circumstances, the employee was given a special direction respecting Bombard. His duty was defined in this particular. He was to be ordered out, and the police were to be summoned if he did not go. Commonly such precautions are not taken nor such directions given respecting the ordinary trespasser. They indicate that the employer and employee realized that they were dealing with a maker of trouble who was or might be generally lawless in his conduct, and who must be treated accordingly for the security of property and the safety of employees and others who might be upon the premises. The liability to whatever personal injury might be likely to arise in dealing with such a person was therefore within the contemplation of the employer and employee in establishing the boundaries of the latter's duty. That became a risk of the employment. It is not usual for people with whom a mill superintendent comes in contact to commit crime. Conduct of that sort is not to be presumed nor commonly expected. Danger of being assaulted is not the usual concomitant of work. But when a special duty arises to deal with one who is a trespasser, an annoyer of a woman employee, and a creator of disturbance, then a corresponding special risk of personal violence arises. That duty and that risk then become correlative. It hardly can be said as matter of law, under these circumstances, that danger of assault from such a creator of disturbance as Bombard was not incidental to the doing of that which Reithel's contract of employment required of him. An element inherent in the performance of the duty of excluding trespassers from property and mischief-makers from the company of employees is that there may be some degree of violence encountered. Those required to deal with lawless persons may be treated with lawlessness. The precise form which that risk may take is not of consequence. Its unexpectedness and gravity are not the test. *Sponatski's Case*, 220 Mass. 526, post, 333, 108 N. E. 466, 8 N. C. C. A. 1025. That murder resulted instead of a broken bone is of slight, if, indeed, it is of any, significance. This injury was one to which the employee was exposed by reason of his employment, and, but for the special duty imposed on him respecting Bombard, he would not have been in the way of receiving it. The causative danger was peculiar to his work. It was incidental to the character of the employment, and not independent of the relation of master and servant.



Although unforeseen, and the consequence of what on this record appears to have been a crime of the highest magnitude, yet now, after the event, it appears to have had its origin in a hazard connected with the employment, and to have flowed from that source as a rational consequence. Tried by the test suggested in *McNicol's Case*, 215 Mass. 497, 499, *infra*, 306, 102 N. E. 697, 4 N. C. C. A. 522, the injury seems to have arisen in the course of the employment.

Under our workmen's compensation act it is not required that the injury be also an accident, differing in this respect from the English act, and being more liberal to the employee. But even under the English act, in the present case the dependent would be awarded compensation. *Trim Joint Dist. School v. Kelly* [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 30 Times L. R. 452, 111 L. T. N. S. 305, 48 Ir. Law Times 141,

58 Sol. Jo. 493; *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507; *Anderson v. Balfour* [1910] 2 I. R. 497, 44 Ir. Law Times 168, 3 B. W. C. C. 588; *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486; *Weekes v. Stead* [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398. It is not necessary to discuss the English cases relied on by the insurer. Many of them are reviewed in *McNicol's Case*, *ubi supra*. While it is possible that some of the English cases are not reconcilable with each other, it seems to us that none are opposed to the result which we have reached.

Decree affirmed.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

RE ANNIE McNICOL et al.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, et al., Appts.

(215 Mass. 497, 102 N. E. 697.)

#### Master and servant — workmen's compensation act — assault by fellow servant.

1. Injury to an employee while he is performing the duties assigned to him, by assault by a fellow servant who is permitted to continue his service while intoxicated, in which condition he is, to the knowledge of the employer, quarrelsome and dangerous, arises "out of and in the course of" the employment, within the meaning of a workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — widow and child — right to share in recovery.

2. In the absence of evidence to show the dependency of a minor child, it will not share with its mother in the fund recovered under a workmen's compensation act for the death of the husband and father, which provides that a wife shall be conclusively presumed to be wholly dependent upon a deceased husband, and that a like presumption exists in favor of a child under the age of eighteen years, like "there being no surviving dependent parent."

**Note.** — As to the application and effect of the workmen's compensation acts generally, see annotation, *ante*, 23.

As to the recovery under the workmen's compensation acts, of compensation for injuries from assaults, see annotation, *post*, 309.

L.R.A.1916A.

#### Same — decree — form — finding.

3. The court must exercise its own judgment as to the kind of decree to be entered under a workmen's compensation act which provides that, when copies of the decisions of the Board and all papers in connection therewith have been transmitted to the court, it shall render a decree in accordance therewith.

(September 12, 1913.)

**A**PPEAL by insurers from a decree of the Superior Court for Suffolk County providing for equal payments to the widow and minor daughter of deceased from a fund recovered in a proceeding under a workmen's compensation act for his death. Reversed.

The facts are stated in the opinion.

Messrs. **Sawyer, Hardy, & Stone** for appellant insurer.

**Mr. Albert S. Apsey**, for dependents:

The injuries and death of this employee can be classed as "arising out of and in the course of his employment."

*Clover, C. & Co. v. Hughes* [1910] A. C. 242, 26 Times L. R. 359, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486; *Nisbet v. Rayne*

& Burn, 26 Times L. R. 632 [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 54 Sol. Jo. 719, 3 B. W. C. C. 507; *Collins v. Collins* [1907] 2 R. I. 104; *Gilman v. Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210; *McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007; *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216.

**Rugg**, Ch. J., delivered the opinion of the court:

This is a proceeding under Stat. 1911, chap. 751, as amended by Stat. 1912, chap. 571, known as the workmen's compensation act, by dependent relatives for compensation for the death of Stuart McNicol.

1. The first question is whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of those words in part 2, § 1, of the act. In order that compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act, and with precision exclude those outside its terms. It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

The exact words to be interpreted are found in the English workmen's compensation act, 1916A.

tion act, and doubtless came thence into our act. Therefore decisions of English courts before the adoption of our act are entitled to weight. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, 15 Am. Neg. Cas. 552. It there had been held that injuries received from alighting on a high and unusually exposed scaffold (*Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 42 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429), from the bite of a cat habitually kept in the place of employment (*Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852), from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath (*Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486), and from an attack upon a cashier traveling with a large sum of money (*Nisbet v. Rayne & Burn* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507), all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service (*Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648), from fright at the incursion of an insect into the room (*Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560), and from a felonious assault of the employer (*Blake v. Head*, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303).

The definition formulated above, when referred to the facts of these cases, reaches results in accord with their conclusions. Applying it to the facts of the present case, it seems plain that the injury of the deceased arose "out of and in the course of his employment." The findings of the Industrial Accident Board in substance are that Stuart McNicol, while in the performance of his duty at the Hoosac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of "blows or kicks administered to him by . . . [Timothy] McCarthy," who was in "an intoxicated frenzy and passion." McCarthy was a fellow workman who "was in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent Matthews," who knowingly permitted him in such con-



dition to continue at work during the day of the fatality, which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were all well known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious attack by a sober fellow workman, or even rough sport or horseplay by companions who might have been expected to be at work. Although it may be that upon the facts here disclosed a liability on the part of the employer for negligence at common law or under the employers' liability act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. A fall from a quay by a sailor while returning from shore leave (*Kitchenham v. The Johannesburg* [1911] 1 K. B. 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 91, s. c. [1911] A. C. 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311), a sting from a wasp (*Amys v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117), and a frost bite (*Warner v. Couchman* [1912] A. C. 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 5 B. W. C. C. 177, 49 Scot. L. R. 681), all have been held to be injuries not "arising out of" the employment. But we find nothing in any of them in conflict with our present conclusion. Nor is there anything at variance with it in *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190, where it was held that injuries resulting from an assault by a drunken stranger upon an employee engaged at his work on the highway did not arise out of the employment. That was a quite different situation from the one now before us.

2. It is necessary to determine the persons to whom the payments provided for in the act shall be made. It may be assumed from this record that no personal representative of the deceased has been appointed. He left a widow and a minor daughter presumably under the age of eighteen years. Part 2, § 7, provides that a

wife conclusively shall be presumed to be wholly dependent upon a deceased husband, while a like presumption exists in favor of "a child or children under the age of eighteen years . . . upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent." The natural meaning of this sentence is that the conclusive presumption of dependency of children is conditioned upon the nonexistence of a surviving dependent parent. There are no other words in this or other sections of the act which control its plain significance. The use of the plural word "dependents" in several places in §§ 6, and 8 in part 2 finds ample justification in the many conceivable instances where several persons may be entitled to share in the payments when there is no surviving husband or wife.

The provisions of Stat. 6 Edw. VII. chap. 58, § 13 as to the dependents entitled to our payments, are wholly different from those of our own act, and decisions of the English courts have no bearing on the case at bar.

3. The act does not contemplate the allowance of bills of exceptions, and that presented in the case at bar must be dismissed. The case is properly here on appeal. *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.

4. There is error in the decree. In the decree entered in the superior court the ruling of the board of arbitration was followed, providing that the payments should be divided equally between the widow and the dependent minor daughter, rather than that of the Industrial Accident Board, that the widow alone was entitled to the payments. This was not in accordance with the act, as has been pointed out. Apparently the judge of the superior court exercised his own judgment as to the kind of decree which the law required upon the facts found. This is correct. Part 3, § 11, of the act, as amended by Stat. 1912, chap. 571, § 14, provides that when copies of the "decision of the Board . . . and all papers in connection therewith" have been transmitted to the superior court, "said court shall render a decree in accordance therewith." This means such a decree as the law requires upon the facts found by the Board. It does not make the action of the superior court a mere perfunctory registration of approval of the conclusions of law reached by the Industrial Accident Board. The section in question doubtless was enacted because of the intimation in the Opinion of Justices, 209 Mass. 607, 612, 96 N. E. 308, 1 N. C. C. A. 557, to the effect that the decisions of the Board must be enforced by appropriate proceed-

ings in court. The obligation placed upon the superior court by the requirement to enter a decree in accordance with the decision is to exercise its judicial function by entering such decree as will enforce the

legal rights of the parties as disclosed by the facts appearing on the record.

It follows that the decree must be reversed and a new decree entered as required by this opinion.

### Annotation—Recovery of compensation where workman suffers injury from assault.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

The fact that the injury was the result of a wilful or even criminal assault by another does not exclude the possibility that the injury was caused by accident. *Western Indemnity Co. v. Pillsbury* (1915) — **Cal.** —, 151 Pac. 398 (section foreman assaulted by member of gang who had been discharged); *RE McNICOL* (workman assaulted by intoxicated fellow workman); *RE REITHEL* (employee shot while attempting to remove intruder from factory in accordance with instructions).

The same view has been taken by the English court.

Thus, an assistant schoolmaster in an industrial school, who died from a fracture of the skull and other injuries, the result of an assault committed upon him by several boys in the school, in pursuance of a prearranged plan, suffers injury by accident. *Kelly v. Trim Joint Dist. School* [1913] **W. C. & Ins. Rep.** 401, 47 **Ir. Law Times**, 151, 6 **B. W. C. C.** 921, affirmed in [1914] **A. C.** (**Eng.**) 667, 111 **L. T. N. S.** 306, 30 **Times L. R.** 452, [1914] **W. N.** 177, 7 **B. W. C. C.** 274, 83 **L. J. P. C. N. S.** 220, 58 **Sol. Jo.** 493, 48 **Ir. Law Times**, 141, [1914] **W. C. & Ins. Rep.** 359.

And the murder of a cashier for the sake of robbery is an accident within the meaning of the statute. *Nisbet v. Rayne* [1910] 2 **K. B.** (**Eng.**) 689, 80 **L. J. K. B. N. S.** 84, 103 **L. T. N. S.** 178, 26 **Times L. R.** 632, 54 **Sol. Jo.** 719, 3 **B. W. C. C.** 507.

A game keeper who is beaten by poachers suffers an injury by accident within the meaning of the act. *Anderson v. Balfour* [1910] 2 **I. R.** 497, 44 **Ir. Law Times**, 168, 3 **B. W. C. C.** 588.

The Scotch court, however, has held that an employee taking the place of strikers, who was assaulted by the latter, is not injured by accident, since the word "accident," taken in its popular sense, excludes a case where the injury is wilfully inflicted by another person. *Murray v. Denholm* [1911] **S. C.** 1088, 48 **Scot. L. R.** 896, 5 **B. W. C. C.** 496. In discussing this decision, however, Viscount Haldane in *Trim Joint Dist. School* **L.R.A.**1916A.

*v. Kelly* [1914] **A. C.** (**Eng.**) 667, 111 **L. T. N. S.** 306, 30 **Times L. R.** 452, [1914] **W. N.** 177, 7 **B. W. C. C.** 274, 83 **L. J. P. C. N. S.** 220, 58 **Sol. Jo.** 493, 48 **Ir. Law Times**, 141 [1914] **W. C. & Ins. Rep.** 359, said that the Scotch court must have misinterpreted former decisions of the House of Lords, and that it is none the less an accident in the ordinary and popular sense in which the word is used because it is caused by personal violence.

Although an assault may be an accident within the meaning of a statute, nevertheless, no compensation is recoverable unless it arose out of and in the course of the employment.

Where an assault is such as is likely to happen because of the very nature of the work being performed, it has been held to arise out of the employment. *Trim Joint Dist. School v. Kelly* [1914] **A. C.** (**Eng.**) 667, 111 **L. T. N. S.** 306, 30 **Times L. R.** 452 [1914] **W. N.** 177, 83 **L. J. P. C. N. S.** 220, 58 **Sol. Jo.** 493, 48 **Ir. Law Times**, 141 [1914] **W. C. & Ins. Rep.** 359, 7 **B. W. C. C.** 274 (assistant schoolmaster in an industrial school, assaulted by several boys of the school, in accordance with prearranged plan); *Nisbet v. Rayne* [1910] 2 **K. B.** (**Eng.**) 689, 80 **L. J. K. B. N. S.** 84, 103 **L. T. N. S.** 178, 26 **Times L. R.** 632, 54 **Sol. Jo.** 719, 3 **B. W. C. C.** 507, 3 **N. C. C. A.** 368 (cashier, traveling with a large sum of money, assaulted and robbed); *Weekes v. Stead* [1914] **W. N.** (**Eng.**) 263, 30 **Times L. R.** 586, 58 **Sol. Jo.** 633, 137 **L. T. Jo.** 180 [1914] **W. C. & Ins. Rep.** 434, 83 **L. J. K. B. N. S.** 1542, 111 **L. T. N. S.** 693, 7 **B. W. C. C.** 398, 6 **N. C. C. A.** 1010 (foreman of company employed in moving furniture assaulted by man to whom he had refused work).

A section foreman in charge of a gang of fifteen or twenty section men, mostly Greeks, may be found to be acting in the scope of his employment in attempting to take a shovel away from one of the gang, who, after he had been properly instructed, continued to do the work in the wrong manner, and who continued to hold the shovel after he had been told to drop it and get his time, and who, upon the foreman's attempting to take the shovel, committed an assault upon him. *Western*



*Indemnity Co. v. Pillsbury* (1915) — **Cal.** —, 151 Pac. 398.

An iron moulder's helper, who, while working in a stooping position in close proximity to boxes of molten metal, was struck by an intoxicated stranger and fell and was burned by the metal, suffered injury by accident arising out of and in the course of his employment. *Shaw v. Macfarlane* (1914) 52 **Scot. L. R.** 236, 8 B. W. C. C. 382. Lord Dundas, in discussing the earlier Scotch case of *Burley v. Baird* [1908] S. C. 545, 45 **Scot. L. R.** 416, 1 B. W. C. C. 7, stated that the Lord Justice Clerk's opinion, so far as based upon the ground that an injury caused by the wilful and unjust act of a wrongdoer cannot be, in any sense, an accident, "cannot, looking to the subsequent march of judicial decisions, now be supported as sound law."

In one case it was held that although the injury was caused by a stone wilfully thrown by a boy, it might be said to be an "accident" from the standpoint of the one who suffered the injury. *Challis v. London & S. W. R. Co.* [1905] 2 K. B. (Eng.) 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23.

Generally, however, assaults are not to be considered as incident to the ordinary work performed by a workman.

Thus, no compensation was allowed where the workman was employed as a cook in a hotel, and a drunken customer came out of the barroom into the kitchen, and made a rush at the cook, who was

injured in trying to avoid him. *Murphy v. Berwick* (1909) 43 **Ir. Law Times**, 126.

So, an employee who goes to the rescue of his employer, who is being attacked by a gang of rowdies, and is stabbed to death, is not injured by an accident arising out of and in the course of his employment. *Collins v. Collins* (1907) 2 I. R. (Ir.) 104.

The risk of being assaulted by a drunken man is not in any way especially connected with or incident to employment as a carter. *Mitchinson v. Day Bros.* [1913] 1 K. B. (Eng.) 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190.

In two cases it has been held that no compensation is recoverable where one workman is injured by a stone thrown in anger by another workman. *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. (Eng.) 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Clayton v. Hardwick Colliery Co.* (1914) 7 B. W. C. C. (Eng.) 643.

An injury received by a workman while he himself was deliberately assaulting a fellow workman is not caused by accident arising out of and in the course of the employment. *Shaw v. Wigan Coal & I. Co.* (1909) 3 B. W. C. C. (Eng.) 81.

And an injury caused by an intentionally felonious assault by an employer upon the workman does not arise out of the employment. *Blake v. Head* [1912] W. C. Rep. (Eng.) 198, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303.

W. M. G.

## MICHIGAN SUPREME COURT.

JANE E. HOPKINS

v.

MICHIGAN SUGAR COMPANY et al.,  
Plffs. in Certiorari.

(— Mich. —, 150 N. W. 325.)

### Master and servant — injury arising out of employment — fall on street.

An injury due to a fall on a slippery street by one employed to supervise his employer's plants, which required him to travel about from place to place, when he is going from the sidewalk onto the street to board a street car to return to his home after a tour of inspection, does not arise

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for injuries received while on the street, see annotation, post, 314.  
L.R.A.1916A.

out of his employment within the meaning of those words in a workmen's compensation act.

For other cases, see *Master and Servant, II.* a, 1, in *Dig.* 1-52 N. S.

(January 4, 1915.)

**C**ERTIORARI to the Industrial Accident Board to review an order affirming an award of the Arbitration Committee to claimant as compensation under the workmen's compensation act for the death of her husband. Reversed.

The facts are stated in the opinion.

Mr. M. J. Cavanaugh, with Mr. Frank J. Riggs, for plaintiffs in certiorari:

Conceding, for the sake of argument, that the facts found by the board are supported by evidence and accepted as true, they are insufficient, as matter of law, to show that the injury of deceased arose in the course of his employment.

*Jackson v. General Steam Fishing Co.* 2 B. W. C. C. 51, 46 Scot. L. R. 55, [1909] S. C. 63; *Russell v. Oregon Short Line R. Co.* 83 C. C. A. 618, 155 Fed. 22; *Wink v. Weiler*, 41 Ill. App. 336; *Baltimore & O. R. Co. v. State*, 36 Md. 542; *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Holness v. Mackay* [1899] 2 Q. B. 319; *Edwards v. Wingham Agri. Implement Co.* [1913] 3 K. B. 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50, 6 B. W. C. C. 511.

The facts found by the board, if accepted as true, are insufficient, as matter of law, to establish an injury arising out of the employment of deceased.

*Fitzgerald v. W. G. Clarke & Son*, 99 L. T. N. S. 101, 1 B. W. C. C. 197, [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018; *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Kelly v. Kerry County Council*, 42 Ir. Law Times, 23, 1 B. W. C. C. 194; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560; *Warner v. Couchman* [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51; *House of Lords* [1912] A. C. 35, [1912] W. C. & Ins. Rep. 28, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 5 B. W. C. C. 177, 49 Scot. L. R. 681; *Karemaker v. The Corsican*, 4 B. W. C. C. 295; *Amys v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117; *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190; *Worden v. Commonwealth Power Co.* 20 Detroit Leg. News No. 39 (Dec. 27, 1913).

Messrs. **Brooks & Cook**, for defendant in certiorari:

The injury arose in the course of the employment.

*Adams v. Iron Cliffs Co.* 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270; *Broderick v. Detroit Union R. Station & Depot Co.* 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 518; *Chitty v. Nelson*, 126 L. T. Jo. 172, 3 N. C. C. A. 274, 2 B. W. C. C. 496; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219; *Alderidge v. Merry* [1913] W. C. & Ins. Rep. 97, 47 Ir. Law Times, 5, [1913] 2 I. R. 308, 6 B. W. C. C. 450; *St. Louis A. & T. R. Co. v. Welch*, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529; *Grant v. Glasgow & S. W. R. Co.* [1908] S. C. 187; *Mitchell v. Glamorgan Coal Co.* 23 Times L. R. 588; *Wright v. Kerrigan* [1911] 2 I. L.R.A. 1916A.

R. 301, 45 Ir. Law Times, 82, 4 B. W. C. C. 432; *Fleet v. Johnson & Sons*, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60; *Sheehy v. Great Southern & W. R. Co.* 47 Ir. Law Times 161, 6 B. W. C. C. 927; *Lee v. Stag Line Co.* 107 L. T. N. S. 509, 156 Sol. Jo. 720, 5 B. W. C. C. 660; *Stapleton v. Dinnington Maine Coal Co.* 107 L. T. N. S. 247, 5 B. W. C. C. 602.

The accident arose out of the employment of the deceased.

*Fitzgerald v. W. G. Clarke & Son*, 99 L. T. N. S. 101, 1 B. W. C. C. 197, [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018; *M'Neice v. Singer Sewing Mach. Co.* 4 B. W. C. C. 351, 48 Scot. L. R. 15, [1911] S. C. 13; *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Pierce v. Provident Clothing & Supply Co.* 104 L. T. N. S. 473, 4 B. W. C. C. 242, [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 27 Times L. R. 299, 55 Sol. Jo. 363; *Dickinson v. Barmack*, 124 L. T. Jo. 403; *Refuge Assur. Co. v. Millar*, 49 Scot. L. R. 67; *Nelson v. Belfast*, 42 Ir. Law Times, 223, 1 B. W. C. C. 158; *Andrew v. Falisworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; *Nisbet v. Rayne & Burn* [1910] 2 K. B. 689, 3 N. C. C. A. 368, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507; *Mitchell v. Glamorgan Coal Co.* 23 Times L. R. 588; *Wright v. Kerrigan* [1911] 2 I. R. 301, 45 Ir. Law Times, 82, 4 B. W. C. C. 432; *Fleet v. Johnson & Sons*, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60; *Sheehy v. Great Southern & W. R. Co.* 47 Ir. Law Times, 161, 6 B. W. C. C. 927; *Lee v. Stag Line Co.* 107 L. T. N. S. 509, 56 Sol. Jo. 720, 5 B. W. C. C. 660; *Stapleton v. Dinnington Maine Coal Co.* 107 L. T. N. S. 247, 5 B. W. C. C. 602.

Mr. **Hal H. Smith** also for defendant in certiorari.

**Steere, J.**, delivered the opinion of the court:

The proceedings in this case, brought here for review by certiorari, arose under act 10, Pub. Acts 1912 (Extra Session), and involve the validity of an award, by the State Industrial Accident Board, of compensation to claimant for the death of her husband on February 13, 1913, against his employer, the Michigan Sugar Company, defendant.

It appears from the finding of the board, supported by competent evidence, that deceased was in the employ of said company as its chief engineer, supervising the installation of machinery in, and operation of, six of its plants located at Saginaw, Bay



City, Alma, Croswell, Caro, and Sebewaing. He resided at Saginaw, had a desk at the office of the company in that city, and did work there from time to time, but had no regular office hours, and was engaged much of his time visiting and looking after the different factories, as directed or as circumstances might require. He received an annual salary, with his traveling expenses paid when going on business of his employer. He sometimes started from the office and at other times from his home when making such trips. On February 4, 1913, he left Saginaw in the morning for Sebewaing, to visit the company's plant at that place. A train arrived at Saginaw from Sebewaing at 5:40 P. M. About 6:40 he arrived home with an injury to his head, which was bleeding a little at the back, and which his wife cared for. He detailed to her, and subsequently to others, how it occurred. No one is shown to have seen the accident. He spent most of the following day at the office, and the day after attended a funeral in Bay City. During those two days he appeared unwell, complained of a severe headache, and in speaking of it told of the accident to which he attributed it. From that time he grew worse, suffered a partial paralysis, with other symptoms of brain pressure, and died on February 13th. Without details, the testimony of physicians showed that his death was caused by a hemorrhage resulting from a small fracture about one-half inch long extending from the vertex of the skull toward the right ear.

It is claimed and found by the Board that upon arriving at the station in Saginaw, upon his return in the evening from Sebewaing, deceased found no street car in sight and started to walk along Washington street in the direction of both his home and the company's office; that after he had walked a number of blocks he saw a street car coming and started from the sidewalk, intending to take it; that the ground there was icy and covered with snow, and he slipped and fell, receiving the injury which eventually resulted fatally. Material parts of this finding are challenged as unsupported by any competent evidence; no witness being shown to have seen the accident. Much clearly incompetent and purely hearsay evidence produced by claimant was admitted in regard to it, some of which showed that deceased ran to catch the car and did not notice the ice until, in hurrying over it, he slipped and fell.

Conceding, however, as contended by claimant, that facts and circumstances properly proven, together with the report of accident made by the defendant company to the Industrial Accident Board, as re-

quired by statute, furnish sufficient evidential support for the findings, and accepting them as true, we are yet impelled, under the authorities, to the view that such findings fail to sustain the conclusion of law by the Board that such accident was naturally or peculiarly incidental to and arose out of deceased's employment.

To justify an award under this act, it must be shown that the employee received "a personal injury arising out of and in the course of his employment." This provision is adopted in identical words from the English workmen's compensation act, and presumably with the meaning previously given it there.

It is well settled that, to justify an award, the accident must have arisen "out of" as well as "in the course of" the employment, and the two are separate questions, to be determined by different tests, for cases often arise where both requirements are not satisfied. An employee may suffer an accident while engaged at his work or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow. 1 Bradbury, Workmen's Compensation, p. 398. "Out of" points to the cause or source of the accident, while "in the course of" relates to time, place, and circumstance. *Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101.

The same provision, in the same words, is found in the Massachusetts workmen's compensation act. In *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522, the controlling question was whether fatal injuries received by an employee through blows and kicks administered by a fellow workman, "in an intoxicated and frenzied passion," arose out of the employment. It appearing that the assaulting fellow servant, with whom deceased was required to work, was, when in liquor, known to be quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, the court held that "a natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion;" but if the assaulter had not been an employee, though the injury would yet have been received in the course of the employment, it could not have been said to have arisen out of it. *Mitchinson v. Day Bros.* [1913] W. C. & Ins. Rep. 324, [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T.

N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190. In that connection, recognizing as controlling authority, and differentiating, many cited English cases upon the subject, the court thus clearly and comprehensively states the rule: "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The question of whether deceased was in any sense within the ambit of his employment at the time and place of the accident is a serious one; but, conceding that the injury befell him while in the course of his employment, can it be fairly traced to his employment as a contributing, proximate cause, or did it come from a hazard to which he, in common with others, would have been equally exposed apart from the employment? No direct causal relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employees to unusual risk or danger of accident of this nature. All that can be claimed is that the accident resulted from the understood extra hazard to which those who travel are exposed; and, while traveling in his employer's business, he was protected against accidents attributable to that extra danger.

Deceased's home and headquarters were in Saginaw. He had a desk in the office of the company, where he did some work. One of the six factories he supervised was in Saginaw. His traveling consisted of journeying L.R.A.1916A.

to the other five factories from time to time as occasion required. On the day in question he had made such a journey to Sebewaing and returned to Saginaw in safety. At the time of the accident he was in his home city, walking along the street, exposed to no more or different hazards of travel than any other citizen, nor than he would have been had he spent the day at the company's office or its Saginaw plant. How is the legal aspect of the case affected by his having gone to Sebewaing during that day, when it appears that his duties of the day were ended and he had returned safely to Saginaw? At the time of his accident he was passing on foot along a familiar highway, upon which was ice and snow,—a natural condition of that season of the year,—involving an increased risk and added danger of falling, common to all and known to all. When he slipped upon the snow-covered ice and fell, he was not riding upon nor getting on or off any conveyance, public or private. No person or thing connected with transportation or travel touched or threatened him. While it is indicated by the record that he desired to take a street car, and was walking or running towards one for that purpose, to assert that he was injured in attempting to take or board a car would be a misleading overstatement. He slipped and fell before reaching it, apparently such a distance away as not to attract the attention of those on the car, as no witnesses to the accident were produced. The Board found that "he started from the sidewalk towards the car with the intention of boarding the same;" and the employer's report, which is the legal basis of such finding, shows that he fell "about one-third distance between sidewalk and car track." The car was presumably somewhere on the track at the time, but just where is not disclosed.

Slipping upon snow-covered ice and falling while walking, or running, is not even what is known as peculiarly a "street risk;" neither is it a recognized extra hazard of travel or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions.

These distinctions are recognized and the rule correctly stated in an opinion of the Michigan Industrial Accident Board, filed in *Worden v. Commonwealth Power Co.* 20 Detroit Leg. News No. 39 (December 27, 1913), as follows: "It must also appear that the injury arose out of the employment and was a risk reasonably incident to such employment, as distinguished from risks to which the general public is exposed. To illustrate: . . . On the other hand, it may be fairly said that one of the most



common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally irrespective of employment.

The board also referred to the fact that claimant was upon his own premises, as of some force, but apparently denied an award upon the ground quoted, which is well supported by former decisions.

In the late case of *Sheldon v. Needham* [1914] W. C. & Ins. Rep. 274, 7 B. W. C. C. 471, 30 Times L. R. 590, 58 Sol. Jo. 652, 111 L. T. N. S. 729, a servant sent to mail a letter slipped in the street, upon a banana peel or some other slippery object, breaking her leg. Citing as controlling several cases involving the same principle, the court held that, although claimant was in performance of the exact thing ordered done, there could

be no award because the accident was not due to any special or extra risk connected with and incidental to her employment, but was of such a nature as to be equally liable to happen under like circumstances to anyone in any employment, and whether employed or not. This unfortunate accident resulted from a risk common to all, and which arose from no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with deceased's employment, and therefore is not shown to have a causal connection with it, or to have arisen out of it.

For the foregoing reasons, we are impelled to the conclusion that the order and award of the Industrial Accident Board in the premises cannot be sustained.

Reversed.

### **Annotation—Recovery of compensation for injury to employee, received while on the street.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

It is a general rule laid down by the great majority of the cases that an injury cannot be said to arise out of the employment of the injured workman where it occurs upon a street, from causes to which all other persons upon the street are likewise exposed.

Thus, compensation has been denied in the following cases, where the injury occurred in the manner indicated: *Rodger v. Paisley School Bd.* [1912] S. C. 584, [1912] W. C. Rep. 157, 49 *Scot. L. R.* 413, 5 B. W. C. C. 547 (school janitor taking message from one head master to another, overcome by heat while on the street); *Symmonds v. King* (1915) 8 B. W. C. C. (Eng.) 189 (painter's laborer obliged to cross street to obtain some paint, knocked by a tramcar); *Sheldon v. Needham* (1914) 30 Times L. R. (Eng.) 590, 58 Sol. Jo. 652, 137 L. T. Jo. 212 [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C. 471 (charwoman sent to post a letter fell and broke her leg on the street); *Greene v. Shaw* [1912] 2 I. R. 430 [1912] W. C. Rep. 25, 46 *Ir. Law Times*, 18, 5 B. W. C. C. 573 (workman obliged to go but once or twice a day over a quiet country road, injured while riding his bicycle); *Slade v. Taylor* [1915] W. C. & Ins. Rep. (Eng.) 53, 8 B. W. C. C. 65 (manager of branch store, who was compelled to go to another branch store once a week, slipped off his bicycle and injured himself); *Hopkins v. MICHIGAN SUGAR Co.* (employee of sugar L.R.A.1916A.

company employed to inspect plants in different places, who, after returning to his own city, slipped while running to get a street car to return to his home); *Newman v. Newman* (1915) — App. Div. —, 155 N. Y. Supp. 665 (employee in meat market, injured while on street, delivering meat on foot); *De Voe v. New York State R. Co.* (1915) 169 App. Div. 472, 155 N. Y. Supp. 12 (motorman, having closed his day's work, slipped on the street while going to have his watch tested).

Some of the cases, however, make a distinction in the case of workmen whose duties are such that they are obliged to be continuously upon the street, or at least to spend a considerable portion of their time there; the theory being that the very nature of their employment subjects them to street dangers more than persons generally are subjected, and consequently injuries from such dangers must be considered as arising out of their employment. *M'Neice v. Singer Sewing Mach. Co.* [1911] S. C. 12, 48 *Scot. L. R.* 15, 4 B. W. C. C. 351 (salesman and collector kicked by a horse while riding his bicycle on the street); *Pierce v. Providence Clothing & Supply Co.* [1911] 1 K. B. (Eng.) 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242 (canvasser and collector collided with street car while riding his bicycle); *Martin v. Lobibond* [1914] 2 K. B. (Eng.) 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 76, 7 B. W. C. C. 243, 5 N. C.

C. A. 985 (draymen held to be more likely to be knocked down by a motor car than other members of the general public).

Injury to a coachman who, with the knowledge of the employer, rode a bicycle to a postoffice to call for a letter, and was injured by a man lurching against the bicycle and upsetting it, arose out of the employment; and the fact that the coachman might have been required to go to the postoffice every day or might not have been obliged to go for a fortnight,

was held immaterial. *Bett v. Hughes* (1914) 52 Scot. L. R. 93, 8 B. W. C. C. 362.

In *Milwaukee v. Althoff* (1914) 156 Wis. 68, post, 327, 145 N. W. 238, 4 N. C. C. A. 110, compensation was allowed for the death of an employee who fell on the street and injured himself while going from the place where he received orders relative to his work, to the place where the work was to be executed.

W. M. G.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

CATHERINE ZABRISKIE, Exrx., etc., of  
John H. Zabriskie, Deceased, Resp.,  
v.

ERIE RAILROAD COMPANY, Appt.

(86 N. J. L. 266, 92 Atl. 385.)

### Master and servant — toilet facilities — crossing street — injury — course of employment.

Where the employer failed to provide proper toilet facilities for employees in the building where they were at work, so that they were obliged to, and did, habitually resort for such facilities during the working hours to another building of the employer, which lay across a public street, and which custom persisted for a considerable time, and, as the court was entitled to find, was therefore known and assented to by the employer, held that, where the deceased, while crossing the street in working hours to reach the toilet in question, was struck by a passing vehicle, sustaining injuries which caused his death, the trial court was justified in finding that he came to his death by an accident which arose out of and in the course of his employment.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(November 16, 1914.)

**A**PPEAL by defendant from a judgment of the Supreme Court, affirming a judgment of the Court of Common Pleas for Passaic County in plaintiff's favor in an action under the workmen's compensation act to recover damages for personal injuries. Affirmed.

The facts are stated in the opinion.

Headnote by PARKER, J.

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to a recovery of compensation for injuries received while seeking toilet facilities, see annotation, post, 317. L.R.A.1916A.

Mr. George S. Hobart, with Messrs. Collins & Corbin, for appellant:

The accident did not arise out of the employment.

*Pearce v. London & S. W. R. Co.* 2 W. C. C. 152; *Rose v. Morrison & Mason*, 80 L. J. K. B. N. S. 1103, 105 L. T. N. S. 2, 4 B. W. C. C. 277; *Greene v. Shaw* [1912] 2 I. R. 430, 46 Ir. Law Times, 18, 5 B. W. C. C. 573; *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Collins v. Collins* [1907] 2 I. R. 104; *Murphy v. Berwick*, 43 Ir. Law Times, 146; *Blake v. Head*, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303; *Guthrie v. Kinghorn* [1913] S. C. 1155, 50 Scot. L. R. 863, 6 B. W. C. C. 887; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35; 78 Cent. L. J. 59; *Steers v. Dunnewald*, 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676.

The accident did not arise in the course of the employment.

*Anderson v. Balfour* [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. C. C. 588; *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486; *Greene v. Shaw* [1912] 2 I. R. 430, 46 Ir. Law Times, 18, 5 B. W. C. C. 573; *Clover C. & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275; *Conway v. Pumpherson Oil Co.* [1911] S. C. 660, 48 Scot. L. R. 632, 4 B. W. C. C. 392; *Pope v. Hill's Plymouth Co.* 102 L. T. N. S. 632, 3 B. W. C. C. 339, affirmed in 132 L. T. Jo. 31, 5 B. W. C. C. 175.

Messrs. Michael Dunn and Charles B. Dunn, for respondent:

Whether the automobile or the locomotive of both were the cause of his death by striking him, decedent came to his death by an accident arising out of and in the course of his employment.



*Anderson v. Balfour* [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. C. C. 588; *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486; *Greene v. Shaw* [1912] 2 I. R. 430, 46 Ir. Law Times, 18, 5 B. W. C. C. 573; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; *Perlsburg v. Muller*, 35 N. J. L. J. 202.

**Parker, J.**, delivered the opinion of the court:

This case arose under the workmen's compensation act of 1911. The question raised is the usual one, viz.: Whether the deceased came to his death by reason of an accident arising out of and in the course of his employment. There is no question whatever but that the deceased was killed by an accident, but the appellant insists that the accident did not arise out of the employment, nor did it arise in the course of the employment; and the question before the supreme court was whether there was any evidence before the trial court to justify such a finding. If there was such evidence, the finding of the court of common pleas is conclusive. *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, affirmed in 86 N. J. L. 701, 91 Atl. 1070; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585. The supreme court seems to have gone a step further and to have made substantially its own finding upon the evidence. This was unnecessary, but, as it necessarily included a finding that there was evidence to support the finding of the trial court, which is sufficient for an affirmance, we do not concern ourselves with the facts further than to ascertain whether there was evidence in the case which the trial court was entitled to take hold of as the basis for its finding of fact as above.

The opinion of the supreme court does not state the evidence with entire accuracy. The deceased was not obliged to cross the railroad, nor was he injured because of so crossing it, but the accident occurred in this way: The tracks of the defendant, Erie Railroad Company, run through Paterson from north to south, crossing Market street, which runs east and west. The Paterson station of the appellant was in the south-westerly angle formed by Market street and the said tracks. The Morris Beef Building, where the deceased was regularly employed by the appellant as a carpenter, was in the northwesterly angle of Market street and the railroad, and consequently the deceased,

in order to reach the station, had to cross, not the railroad, but Market street, which was a public highway and the principal artery of traffic in Paterson. There was no toilet in the Morris Beef Building, and of course the defendant's employees had to go somewhere to satisfy the calls of nature. Apparently the most convenient place, and the place where, as the trial court was justified by the evidence in finding, they had been for some time accustomed to going, was the men's toilet room in defendant's railroad station across Market street. There was evidence that this was the only place that they had to go to, and that for a year or more prior to the accident it was the habitual practice of defendant's employees working in the Morris Beef Building to use the station toilet for their personal needs. At the time of the accident, the deceased was on his way from the Beef Building across Market street, and bound for the station toilet, when he was struck by an east-bound automobile on Market street, and thrown or carried over on the railroad track, where he was again struck by a north-bound train that was just starting from the station. This occurred about 11 A. M.

There can be no doubt that the trial court was fully justified in finding that the accident occurred in the course of the employment of the deceased; that it took place during the regular working hours, and while he was answering a call of nature which is liable to occur at any time. It was argued that he was not doing his employer's work at the time, but there is little or no force in this, for in the end it is as important to the employer as to the employee that the latter may do his work without unnecessary physical inconvenience. The trial court was also justified in finding upon the evidence adduced that the accident arose out of the employment. The difficulty in the case arises from the fact that the place where the deceased was struck was a public street, and that he was struck by an independent agency, to wit, an automobile driven by a stranger and lawfully in said street. Hence it is argued that the deceased was not, and could not have been, injured by any cause for which the master was responsible, or to which he was subjected by the conditions of his employment. But we consider this argument also to be without support. It is not only conceivable, but it is a matter of daily occurrence, that employees are required to do their work under conditions which render them liable to injury by outside agencies. It is only necessary to cite the case of *Newark Paving Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91, recently affirmed here on the opinion of the

supreme court in 86 N. J. L. 690, 92 Atl. 1086, where the place of work of the deceased was in a public street, and during working hours, while waiting for his work to begin, or attending to some incidental matters in the interim, Klotz was struck by a trolley car and killed. It was there held that the accident arose out of and in the course of his employment; and the only ground for claiming the existence of a distinction between that case and the case at bar is that in the Klotz Case the deceased was at the place where he had to do his work, and in the present case the deceased had left the place where he actually worked and was on his way to a convenience. The distinction is unsubstantial; for if the trial court found, as it evidently must have found and was entitled to find, that by reason of the lack of proper appliances in the Morris Building and the consequent necessity of going elsewhere,—a condition for which the employer was, of course, responsible,—the practice had arisen and been in force for an extended period of workmen resorting to the only place available, to reach which they were necessarily obliged to cross a public street, and that this practice was known and assented to by the employer (*Dierkes v. Hauxhurst Land Co.* 80 N. J. L. 369, 34 L.R.A.(N.S.) 693, 79 Atl. 361, 83 N. J. L. 623, 83 Atl. 911), the workman was as much obliged by the conditions of his employment to be where he was at the time when he was struck as if he had been a laborer tamping paving blocks in the middle of the street. Viewed in this aspect, the danger was one which, in the language of the cases, was peculiar to the employment, in that the absence of proper facilities at the shop and the necessity of crossing the street to reach them gave rise to it. It was not the danger of an ordinary member of the public crossing a street on his own business, but was the subjection of the employee to that danger by the conditions of his employment. The fact that the accident may have been, and probably was, due to the negligence of the driver of the automobile, and perhaps also to the contributory negligence of the deceased, tends to cloud

the issue, but does not differentiate the situation from that of any workman who is required in the performance of his work to go into a dangerous place and incur the dangers connected with that place.

There were, therefore, two concurring causes of the accident; namely, the automobile and the necessity of crossing the street, for the latter of which the employer was responsible. In this aspect the case resembles *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522, where deceased was put to work next or near to a fellow workman who was known to the employer to be addicted to drink and was ugly when in his cups. While deceased was at work, this man, being drunk, attacked and killed him, or injured him so that he died, and the supreme court of Massachusetts held that the injury arose out of and in the course of the employment; putting its decision upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. In the language of the Massachusetts court, the act of the automobile driver and the conditions of employment that required the deceased to cross a street were contributing proximate causes, the latter of which was an actual risk of the employment.

The case of *Pearce v. London & S. W. R. Co.* (1899) 2 W. C. C. 152, is relied on by counsel for appellant. That case was affirmed in the court of appeal, but the affirmation was placed upon a ground quite different from that taken by the court below; and in *Elliott v. Rex* (1904) 116 L. T. Jo. 314, 6 W. C. C. 27, the court refused to follow the *Pearce* Case, and sustained an award in favor of a workman injured while coming from the toilet during the dinner hour.

Our conclusion is that the evidence sustained a finding by the trial court that the accident arose both out of and in the course of the employment of deceased, and that the judgment of the Supreme Court, affirming the judgment of the Common pleas, should in turn be affirmed.

### Annotation—Injuries received while seeking toilet facilities as “arising out of” the employment.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

Undoubtedly, all of the courts would sustain the decision of the New Jersey court in *ZABRISKIE v. ERIE R. CO.*, that risks necessarily incurred by an employee in seeking required toilet facilities must L.R.A.1916A.

be held to arise out of and in the course of the employment.

In *De Filippis v. Falkenberg* (1915) — App. Div. —, 155 N. Y. Supp. 761, it was said that the claimant, while accepting the conveniences of a toilet room maintained by the employer, was “still in the employ of the master.”



However, a workman who goes into dangerous or unauthorized places for that purpose does so at his own risk, and no compensation is recoverable for injuries received while he is in such unauthorized and dangerous places. *Rose v. Morrison* (1911) 80 L. J. K. B. N. S. (Eng.) 1103, 105 L. T. N. S. 2, 4 B. W. C. C. 277. Particularly, if adequate places have been provided by the employer. *Thomson v. Flemington Coal Co.* [1911] S. C. 823, 48 Scot. L. R. 740, 4 B. W. C. C. 406; *Cook v. Manvers Main Collieries* (1914) 7 B. W. C. C. (Eng.) 696.

So, the employers cannot be held liable for injuries received by a workman where he leaves the sphere of his employment and goes for purposes of his own onto

private property, where the employers cannot follow him, even if they so wish. (*Cogdon v. Sunderland Gas Co.* (1907; C. C.) 1 B. W. C. C. (Eng.) 156.

But upon the ground that the county court judge was justified in drawing the inference that the workman went to the unauthorized place as a matter of necessity, and not of his choice, an award of compensation was upheld in the case of a miner, who, after receiving his lamp at the lamp cabin, went to answer a call of nature at a place sometimes used by the miners in case of necessity, and who was killed on a siding over which he was obliged to pass. *Lawless v. Wigan Coal & I. Co.* (1908) 124 L. T. Jo. (Eng.) 532, 1 B. W. C. C. 153. W. M. G.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

EMILY SUNDINE, Employee.

F. L. DUNNE & COMPANY, Employer.

LONDON GUARANTEE & ACCIDENT COMPANY, LIMITED, Insurer, Appt.

(218 Mass. 1, 105 N. E. 433.)

**Master and servant — workmen's compensation act — injury while leaving premises for luncheon.**

An injury to one employed by the week, upon stairs which are not under the employer's control, but afford the only means of going to and from the workroom, while leaving the premises for the purpose of procuring a luncheon, arises out of and in the course of his employment, within the meaning of the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(May 22, 1914.)

**A**PPEAL by insurer from a decree of the Superior Court for Suffolk County in favor of the employee in a proceeding to determine her right to compensation as an employee of insured under the workmen's compensation act. Affirmed.

The facts are stated in the opinion.

Mr. H. S. Avery, for appellant:

The injury sustained did not arise out of and in the course of employment within the meaning of the workmen's compensation act.

Caton v. Summerlee & M. Iron & Coal

**Note.**—As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to the recovery of compensation for injuries received while procuring refreshments, see annotation, post, 320. L.R.A.1916A.

Co. 39 Scot. L. R. 762, 4 Sc. Sess. Cas. 5th Series, 989, 10 Scot. L. T. 204.

Sundine was not an employee of the insurer.

*Dane v. Cochrane Chemical Co.* 164 Mass. 453, 41 N. E. 678.

The way upon which the injury occurred was not a way over which F. L. Dunne & Company as employers had any control, nor did they owe any duty to their employees to see that its condition was safe, so that an employee of Olsen could claim no greater rights than those of the insured.

*Hawkes v. Broadwalk Shoe Co.* 207 Mass. 117, 44 L.R.A.(N.S.) 1123, 92 N. E. 1017.

The ways or means of exit must be provided by the employer, and must be incidental to and a part of the contract of employment. The employee who has stopped his work for the employer, and has become his own master, is no longer acting within scope of his employment, even though he may be on premises in control of the employer.

*Gooch v. Citizens' Electric Street R. Co.* 202 Mass. 254, 23 L.R.A.(N.S.) 960, 88 N. E. 591; *Dickinson v. West End Street R. Co.* 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60, 9 Am. Neg. Rep. 293; *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 325, 37 N. E. 770; *Palmer v. Lawrence Mfg. Co.* 12 Allen, 69; *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; *Baird v. Pettit*, 70 Pa. 477; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *State use of Abell v. Western Maryland R. Co.* 63 Md. 433.

Mr. Richard J. Lane, for appellee:

The petitioner's injury arose out of and in the course of her employment.

*McNicol's Case*, 215 Mass. 498, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Gill-*

shannon v. Stony Brook R. Corp. 10 Cush. 228; Kilduff v. Boston Elev. R. Co. 195 Mass. 307, 9 L.R.A.(N.S.) 873, 81 N. E. 191; McGuirk v. Shattuck, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570; Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 64 N. E. 726; Dawbarn, Workmen's Compensation Act, 4th ed. 118; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105; Moore v. Manchester Liners [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 3 B. W. C. C. 527, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703; Sharp v. Johnson & Co. [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482; Gane v. Norton Hill Colliery Co. [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 2 B. W. C. C. 42, 100 L. T. N. S. 979, 25 Times L. R. 640; Keenan v. Flemington Coal Co. 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th series, 164, 10 Scot. L. T. 409; MacKenzie v. Coltness Iron Co. 41 Scot. L. R. 6; Cremins v. Guest, Keen & Nettlefolds [1908] 1 K. B. 469, 77 L. J. K. B. N. S. 326, 98 L. T. N. S. 335, 24 Times L. R. 189; Leach v. Oakley Street & Co. [1911] 1 K. B. 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27 Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. C. C. 91.

Sheldon, J., delivered the opinion of the court:

It is provided by statute (Stat. 1911, chap. 751, pt. 3, § 17) that "if a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, . . . and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act," if the independent contractor were a subscriber. By the word "association" is meant the Massachusetts Employees' Insurance Association (part 5, § 2, of the same act); and this insurance company is under the same liability that the association would have been (Stat. 1912, chap. 571, § 17). It follows that the petitioner has the same rights against this insurance company as if it had directly insured her employer Olsen.

The insurer does not deny this, but it contends that the petitioner's injury did not arise "out of and in the course of" her employment within the meaning of part 2, § 1, of the act first referred to. This is because she was injured at about noon, after she had left the room in which she worked, for the

purpose of getting a lunch, and upon a flight of stairs which, though affording the only means of going to and from her workroom, was yet not under the control either of Olsen, her employer, or of F. L. Dunne & Company, for whose work Olsen was an independent contractor.

The first contention, that she was not in the employ of Olsen while she was going to lunch, cannot be sustained. Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose, and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose. Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 102, 64 N. E. 726. The decisions upon similar questions under the English act are to the same effect. Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, which went on the ground that the dinner hour, though not paid for, was yet included in the time of employment. Moore v. Manchester Liners, 3 B. W. C. C. 527, [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, where the House of Lords reversed the decision of the court of appeal, reported in [1909] 1 K. B. 417, 78 L. J. K. B. N. S. 463, 100 L. T. N. S. 164, 25 Times L. R. 202, and held, following the dissenting opinion of Moulton, L. J., that a temporary absence by permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that an injury occurring during such a temporary absence arose "out of and in the course of" the employment. Gane v. Norton Hill Colliery Co. 2 B. W. C. C. 42, [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 10 L. T. N. S. 979, 25 Times L. R. 640; Keenan v. Flemington Coal Co. 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th series, 164, 10 Scot. L. T. 409; MacKenzie v. Coltness Iron Co. 41 Scot. L. R. 6.

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor F. L. Dunne & Company had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises where she was employed, the means which she practically was invited by Olsen and by F. L. Dunne & Company to use. In this respect, the case resembles Moore v. Manchester Lines, supra; and that case, decided under the English act before the passage of our statute, must be regarded as of great



weight. *McNichol's Case*, 215 Mass. 497, 499, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522. It is true that before the passage of Stat. 1911, chap. 751, the petitioner could not have held her employer for this injury. *Hawkes v. Broadwalk Shoe Co.* 207 Mass. 117, 44 L.R.A.(N.S.) 1123, 92 N. E. 1017. But that now is not a circumstance of much importance, for one of the purposes of our recent legislation was to increase the right

of employees to be compensated for injuries growing out of their employment.

It was a necessary incident of the employee's employment to use these stairs. We are of opinion that, according to the plain and natural meaning of the words, an injury that occurred to her while she was so using them arose "out of and in the course of" her employment. The decree of the Superior Court must be affirmed.

### **Annotation—Injuries received while procuring refreshment, as arising out of and in the course of the employee's employment.**

As to application and effect of workmen's compensation acts generally, see annotation ante, 23.

The decision in *RE SUNDINE* is supported by a number of decisions of the English courts which very generally recognize that the procuring of food or other refreshment is essential to the employment of a workman, and the latter does not, as a matter of course, go outside of his employment, when he leaves off active work in order to secure food or drink. *Carinduff v. Gilmore* (1914) 48 Ir. Law Times, 137, [1914] W. C. & Ins. Rep. 247, 7 B. W. C. C. 981 (girl employed on threshing machine entitled to compensation for injuries received while partaking of a lunch furnished by the employer); *Low v. General Steam Fishing Co.* [1909] A. C. (Eng.) 523, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 53 Sol. Jo. 763 (watchman on a quay whose watch continued for twenty-five hours, and who was to furnish his own food and drink, not outside scope of duty in leaving place of duty for a short time to get a drink); *Martin v. Lovibond* [1914] 2 K. B. (Eng.) 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 76, 7 B. W. C. C. 243 (drayman on duty from 8 o'clock in the morning until 8 o'clock in the evening not out of his employment in stopping dray and crossing the street to a public inn to get a glass of beer, and returning within two minutes to his dray); *Keenan v. Flemington Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409 (employee injured upon returning to his work from procuring a drink of water); *Earnshaw v. Lancashire & Y. R. Co.* (1903; C. C.) 115 L. T. Jo. (Eng.) 89, 5 W. C. C. 28 (employee went, with employer's knowledge, to cabin upon employer's premises for tea, and was in-  
L.R.A.1916A.

jured while returning from the cabin); *Morris v. Lambeth Borough Council* (1905) 22 Times L. R. (Eng.) 22 (night watchman injured by falling of a shanty in which he went to cook some food).

In *M'Laughlan v. Anderson* [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376, recovery of compensation was allowed where a workman fell from a wagon in which he was riding in the course of his employment, while attempting to recover his pipe, which he had dropped. The court said that a workman of his sort might reasonably smoke, might reasonably drop his pipe, and might reasonably attempt to pick it up again.

The mere fact that a workman is paid by the hour does not disentitle him to compensation for injuries received while engaged in eating his lunch. *Blovelt v. Sawyer* [1904] 1 K. B. (Eng.) 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105.

But the lunch hour of a law writer is not a part of the time of his employment. *McKrill v. Howard* (1909) 2 B. W. C. C. (Eng.) 460.

A decision of the Michigan court is somewhat in conflict with the weight of authority. In *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409, it was held that an employee who, contrary to his usual custom, left his place of employment at the noon hour to go home to his lunch, because, upon this occasion, he had failed to bring it with him, as was customary with the crew, and as he had always done before, was not, while so going to his dinner, in the employment, although at the time of his injury he was still upon the master's premises. The court said he was going upon a mission of his own, merely to please himself. W. M. G.

**MASSACHUSETTS SUPREME JUDICIAL COURT.**

RE EMMA L. BRIGHTMAN, Widow of  
Ira B. Brightman, Deceased, Dependent.

J. C. TERRY, Employer.

ÆTNA LIFE INSURANCE COMPANY,  
Insurer, Appt.

(220 Mass. 17, 107 N. E. 527.)

**Master and servant — workmen's compensation act — appeal — findings unsupported by evidence.**

1. Where, by statute, the committee on arbitration under the workmen's compensation act is required to report all the evidence before it, a losing party may argue that the findings are not supported by the evidence, although it does not affirmatively appear that all the material evidence is set out.

*For other cases, see Appeal and Error, VII. d, in Dig. 1-52 N. S.*

**Same — death from heart disease — course of employment.**

2. The death from heart disease of a cook upon a lighter, where he is required to live, due to exertions in saving his personal effects when the vessel begins to sink, arises out of and in the course of his employment within the operation of the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(December 31, 1914.)

**A**PPEAL by the insurer from the decision of the Industrial Accident Board in favor of the widow in a proceeding under the workmen's compensation act to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Mr. John T. Swift for appellant.

Messrs. Richard P. Borden and James H. Kenyon, Jr., for defendant:

There is no question for the determination of the court.

Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549; Herrick's Case, 217 Mass. 111, 104 N. E. 432, 7 N. C. C. A. 554; Diaz's Case, 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609; Bentley's Case, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559.

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for injuries received while trying to save personal belongings, see annotation, post, 322.  
L.R.A.1916A.

The employee was acting in the course of the employment.

Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; Bentley's Case, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; Diaz's Case, 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609; McNicol's Case, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; Sundine's Case, 218 Mass. 1, ante, 318, 105 N. E. 433, 5 N. C. C. A. 616; M'Lauchlin v. Anderson [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376; Cokolon v. The Kentra, 5 B. W. C. C. 658.

The death of the employee arose out of and in the course of his employment.

M'Lauchlin v. Anderson [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376; McNicol's Case, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; Moore v. Manchester Liners [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527; Canavan v. The Universal, 3 B. W. C. C. 355; Clover, C. & Co. v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275; Yates v. South Kirby, F. & H. Collieries [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225; M'Innes v. Dunsmuir [1908] S. C. 1021, 45 Scot. L. R. 804, 1 B. W. C. C. 226; Wicks v. Dowell & Co. [1905] 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732, 7 W. C. C. 14; Hurlie's Case, 217 Mass. 223, ante, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527.

Rugg, Ch. J., delivered the opinion of the court:

On this appeal from a decree made under the provisions of the workmen's compensation act, it is contended by the dependent that the question whether the findings are supported by the evidence is not open. By Stat. 1911, chap. 751, pt. III., § 7, as amended by Stat. 1912, chap. 571, § 12, the arbitration committee is required to file with the Industrial Accident Board its decision, "together with a statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it." No party is entitled to a second hearing as matter of right before the Industrial Accident Board upon any question of fact. Section 10 of part III. It seems from the record and the course of the argument in this court that no evidence was received by the Industrial Accident Board, but that its hearing was confined in this respect to the



matters reported by the arbitration committee. The finding and decision of the Industrial Accident Board are not explicit in this respect. It would be desirable to have the fact stated definitely in order that occasion for doubt may be removed in future cases. But we feel warranted in making that assumption in the case at bar for the reasons stated. In any event, it is an assumption in favor of the appealing party. It must be assumed that the arbitration committee performed its duty and reported all the material evidence. The procedure in this respect differs from that on exceptions from the superior court, where, if the sufficiency of the evidence to support the verdict or finding is raised, it must appear that the material evidence is set forth. And the procedure also differs from that on findings and decision of the Industrial Accident Board. *Stickley's Case*, 219 Mass. 513, 107 N. E. 350. The positive duty resting on the arbitration committee to report all material evidence supplies the absence of the express statement required in a bill of exceptions. It follows that it is open to the insurer to argue that the findings are not supported by the evidence reported.

The deceased employee was a cook upon a lighter, where his employment required him to live and be a large part of the time. The craft began to sink and he then made several trips to and from the deck in an attempt to save some of his clothes and a surveying instrument. With these he hastened to the pier of a dock, where he died soon after. He had suffered from valvular disease of the heart, and his exertions in the effort to save his belongings and the excitement incident to the loss of the vessel so aggravated the heart weakness as to cause his death. The perils of the sea were risks arising out of and in the course of the employment of the deceased. The sinking of the boat obviously was one of these perils. It is impossible to say as matter of law that it is not one of the instincts of humanity to try to save from a sinking vessel all of one's possessions that reasonably can be secured. The deceased perhaps exerted himself too much for this purpose, although it would be difficult on the evidence to determine to how great an extent the fatal result was due to that cause

rather than to the excitement of the occasion. Under these circumstances the calm and wisdom of quiet and safety cannot be expected. Much must be excused to the surrounding commotion. The deceased did not abandon the service of his employer and embark on a venture of his own when he tried to save his clothing. It was an implied term of such service as this that the employee might use reasonable effort to this end in an exigency like that which arose. This is not an instance where the discipline of a ship was violated or a higher duty neglected. It was in the course of his employment to live upon the lighter. Whatever it was reasonable for anyone to do leaving a sinking vessel, which was his temporary home, was within the scope of his employment. The standard to be applied is not that which now, in the light of all that has happened, is seen to have been directly within the line of labor helpful to the master, but that which the ordinary man, required to act in such an emergency, might do while actuated with a purpose to do his duty. The cases relied upon by the insurer, collected in 25 *Harvard L. Rev.* 420, 421, are distinguishable. They all are instances of conduct by the employee quite outside the scope of the employment, resting upon intelligent abandonment for the moment of duty to the employer. In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter. *McNichol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522.

Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act. *Wiemert v. Boston Elev. R. Co.* 216 Mass. 598, 104 N. E. 360; *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 *Times L. R.* 359, 54 *Sol. Jo.* 375, 47 *Scot. L. R.* 885, 3 B. W. C. C. 275. The finding of the Industrial Accident Board that the death of the employee arose out of and in the course of his employment was warranted by the evidence.

Decree affirmed.

### **Annotation—Recovery of compensation for injuries received while trying to save personal belongings from loss.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

There appears to be no other case where compensation was sought for in-  
L.R.A.1916A.

injuries received while the workman was attempting to save his personal effects, but the decision in *RE BRIGHTMAN* finds support in a number of decisions in which compensation was allowed where the in-

juries were received by the workman, not in performing his ordinary work, but where he was acting in an emergency. See cases cited in notes 20 et seq. on p. 56, ante.

In *Gonyea v. Canadian P. R. Co.* (1913) 7 B. W. C. C. (Sask.) 1041, the supreme court of Saskatchewan held that an injury to a workman employed by a railroad company arose out of his employment where he was injured while on the defendant's premises by their permission, for the purpose of procuring some of his personal belongings, which had been brought by one of the employer's trains from his last place of work. This decision, although turning solely upon the fact that the workman was acting with the permission of his employer, supports *RE BRIGHTMAN* in that compensation was allowed, although the injury was

received while the workman was engaged solely in looking after his own personal belongings.

The effect of the decision in *Whitfield v. Lambert* (1915) 112 L. T. N. S. (Eng.) 803, [1915] W. C. & Ins. Rep. 48, 8 B. W. C. C. 91, seems to be to the contrary. Here a workman employed by a farmer was injured while using the farmer's horse and cart to fetch his box from the station, and it was held that he was not entitled to compensation, although it was a term of the contract of employment that he was to have a horse and cart for that purpose. *Swinfen Eady, L. J.*, said: "Applicant was merely using the respondent's horse and cart with leave and license, as it was agreed that he was at liberty to do. He was going on his own business, and not on the farmer's business." W. M. G.

## MICHIGAN SUPREME COURT.

WILLIAM MCCOY

v.

MICHIGAN SCREW COMPANY, Plff. in Certiorari.

(180 Mich. 454, 147 N. W. 572.)

### Master and servant — workmen's compensation act — loss of eye through infection.

Loss of eye through infection carried to it by the fingers when attempting to allay irritation caused by steel splinters which lodged in it from a machine on which an employee was working is not an injury arising out of or in the course of the employment, within the meaning of the workmen's compensation act.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. 8.

(June 1, 1914.)

**C**ERTIORARI to the Industrial Accident Board to review an award to claimant, by an arbitration committee, of damages for the loss of an eye, under the workmen's compensation act. Reversed.

The facts are stated in the opinion.

Mr. Stevens T. Mason, for plaintiff in certiorari:

Claimant is not entitled to compensation if something other than the injury was the proximate cause of the loss of his eye.

1 Cyc. 274; Thomp. Neg. § 54; The Clara,

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for loss of eye through external infection, see annotation, post, 320.

L.R.A.1916A.

5 C. C. A. 390, 14 U. S. App. 346, 55 Fed. 1021; *Haile v. Texas & P. R. Co.* 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Chesapeake & O. R. Co. v. Heath*, 103 Va. 64, 48 S. E. 508; *Louisville & N. R. Co. v. Sealf*, 33 Ky. L. Rep. 721, 26 L.R.A. (N.S.) 263, 110 S. W. 862; *Ruegg, Workmen's Compensation*, 323, 340; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Hubbard v. Travelers' Ins. Co.* 98 Fed. 932; *New Amsterdam Casualty Co. v. Shields*, 85 C. C. A. 122, 155 Fed. 54; *Illinois Commercial Men's Asso. v. Parks*, 103 C. C. A. 286, 179 Fed. 794; *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 102 N. W. 190; *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; *Maryland Casualty Co. v. Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1062; *Street v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Dunham v. Clare*, 4 W. C. C. 102 [1902] 2 K. B. 293, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645; *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; *McCarmel v. Howell*, 36 Ill. App. 68; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; *Lalone v. United States*, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134, 3 Am. Neg. Cas. 667; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49



Am. Rep. 168, 3 Am. Neg. Cas. 148; Travelers' Ins. Co. v. Melick, 27 L.R.A. 629, 12 C. C. A. 544, 27 U. S. App. 547, 65 Fed. 178; Craske v. Wigan [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35; Wolsey v. Pethick Bros. 1 B. W. C. C. 411; Boyd, Workmen's Compensation, § 559; Mitchell v. Glamorgan Coal Co. 23 Times L. R. 588; Gibley v. Great Western R. Co. 3 B. W. C. C. 135, 102 L. T. N. S. 202; Barnabas v. Bersham Colliery Co. 3 B. W. C. C. 216, 102 L. T. N. S. 621; White v. Sheepwash, 3 B. W. C. C. 382; Charles v. Walker, 2 B. W. C. C. 5, 25 Times L. R. 609.

Messrs. Person, Shields, & Silsbee, for defendant in certiorari:

Claimant was entitled to the compensation awarded by the arbitration committee.

Baldwin, Personal Injuries, § 167; Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 409, 41 N. W. 490; Shumway v. Walworth & N. Mfg. Co. 98 Mich. 415, 57 N. W. 251, 15 Am. Neg. Cas. 10; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Schwingschlegal v. Monroe, 113 Mich. 685, 72 N. W. 7; Reed v. Detroit, 108 Mich. 224, 65 N. W. 967; Zibbell v. Grand Rapids, 129 Mich. 659, 89 N. W. 563; Hall v. Cadillac, 114 Mich. 99, 72 N. W. 33; Rawlings v. Clyde Plank & Macadamized Road Co. 158 Mich. 143, 122 N. W. 504; Beauerle v. Michigan C. R. Co. 152 Mich. 345, 116 N. W. 424; 1 Thomp. Neg. § 149; Young v. Accident Ins. Co. Montreal L. Rep. 6 S. C. 3; Hatchell v. Kimbrough, 49 N. C. (4 Jones, L.) 163; Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am. Neg. Cas. 197; Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74, 3 Am. Neg. Cas. 655; Stewart v. Ripon, 38 Wis. 584; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Dickson v. Hollister, 123 Pa. 421, 10 Am. St. Rep. 533, 16 Atl. 484; Houston & T. C. R. Co. v. Leslie, 57 Tex. 83, 6 Am. Neg. Cas. 492; Beauchamp v. Saginaw Min. Co. 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65; Louisville & N. R. Co. v. Northington, 91 Tenn. 56, 16 L.R.A. 268, 17 S. W. 880; Dunham v. Clare, 4 W. C. C. 102 [1902] 2 K. B. 293, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645.

Kuhn, J., delivered the opinion of the court:

The claimant, William McCoy, was employed by the contestant and appellant as an operator on a lathe machine. On February 1, 1913, several small pieces of steel from the machine on which he was working lodged in his eye. This, it is claimed, L.R.A.1916A.

caused an irritation and caused him to rub his eye. At the time, claimant was being treated by Dr. A. M. Campbell for gonorrhea. On February 7th he went to Dr. Cochrane, who removed four pieces of steel from the eye. The next day the doctor removed another piece of steel and discovered that the eye had become infected with gonorrhea. He was then sent to a hospital and subsequently lost the sight of the eye. The Industrial Accident Board affirmed an award made claimant by an arbitration committee of \$6.49 per week for 100 weeks.

It is the claim of contestant and appellant that the loss of the eye was not the result of a personal injury arising out of and in the course of claimant's employment, but was the direct result of a disease unconnected in any way with his employment. At the hearing before the Industrial Accident Board, four physicians were sworn, who testified as to the effect upon the eye of gonorrheal infection.

Claimant contends that the germs would not have entered the eye had not the steel caused "(a) an inclination to rub—the inciting cause; (b) inflamed condition which made the eye susceptible to the entry of the germs, as in the case of blood poison and erysipelas."

A careful reading of the testimony of the physicians shows that the infection can easily be caused to a normal eye by rubbing the eye with a hand infected with the gonorrheal germ.

Dr. Bret Nottingham testified:

Mr. Mason: And will you say as an expert how gonorrhea can be communicated to the eye? Is it by germ or otherwise?

A. Yes; it is a contagious disease, of course, produced by this germ, and a person, in caring for themselves as they have to, get some of this pus on their finger containing the germs, and of course, the eye being irritable, would rub the eye with the finger containing this pus.

Mr. Mason: No doubt that infection of the eye was caused by the entering of gonorrhea germs. Could that infection occur if there was no injury in the eye?

A. Yes.

Mr. Mason: Therefore, if a perfectly normal eye will be rubbed by a hand infected with the germ, it will infect the eye.

A. It might be very easily infected; a normal eye can be infected in this same manner.

Mr. Mason: Suppose this boy had not had any injury to his eye, and had rubbed his eye; would it be possible that he could have lost his eye?

A. Yes; the same result might have been obtained.

Dr. Cushman testified: "Gonorrhea is one of the most common conditions that there is, perhaps, and it is an admitted fact, without any argument upon what we are supposed to know, that the gonorrhea germ will attack and penetrate the unaffected covering of the eye. I have heard it said on reasonably good authority that it is perhaps the only germ that will attack an uninjured eye; but the fact of there having been this injury to the eye from the steel, without any question, in my mind, has lowered the resistance of the eye, that is, weakened it, and made it less resistant to the infection. With the inflammation, it was much more probable that the eye become affected. Now, if the infection of gonorrhea was easier transmitted to the eye, there would be probably about 50 per cent of us running around blind. That is, the gonorrhea is common, and you don't see many blind. I have heard that 90 per cent of the men in a certain town either have or have had gonorrhea, and 90 per cent of the men haven't got bad eyes, and probably have been careless about their fingers. The presence of an injury to the eye makes it far more probable that the eye will become diseased."

Dr. Cochrane testified:

Mr. Mason: Dr. Cochrane, did you examine this William McCoy; on what date?

A. February 7th.

Mr. Mason: He came to you for what trouble?

A. He complained of steel in his eye.

Mr. Mason: Did you take the foreign bodies?

A. Yes.

Mr. Mason: Where were they in the eye?

A. On the upper lid on the under side.

Mr. Mason: Were they in a place where they would have been apt to give very serious injury to the eye?

A. Not serious injury; they would produce irritation.

Mr. Mason: Does the present loss of the eye result from these cinders having been in or from another cause?

A. The direct cause is from the gonorrhea infection.

Mr. Mason: Therefore the loss of the eye is the direct result of disease, and not of accident.

A. The immediate cause is the disease.

Mr. Mason: In other words, what we call the resulting cause is the disease.

A. The immediate or direct cause.

Mr. Mason: How did that gonorrhea get into his eye?

A. Probably from rubbing with his fingers.

L.R.A.1916A.

Mr. Mason: He had gonorrhea before that?

A. I understand so.

Mr. Mason: At the time you examined him did he have gonorrhea?

A. I understand so.

Mr. Reaves: You say, Doctor, that that was the approximate cause of the loss of his eye—the immediate cause; what would you say if he had not have had the steel in his eye?

A. If he had not had the steel in his eye, he might not have rubbed his eye, at least not as vigorously as he did, and so he might not have infected the eye.

Dr. Campbell testified:

Mr. Atkins: How much more chance would there be for his losing his eye after having the piece of steel in there, and the inflammation with it—how much more chance would there be to lose the eye?

A. Just as soon as the infection gets in there I don't think it would make a great deal of difference. You are just as liable to lose the eye as soon as your infection gets there, whether you had anything in there or not. The point is here, your steel would be an inciting cause, and get infection on that account; but, once you get the infection, you are liable to lose the eye one way or the other. The point is here, there is an inciting cause from rubbing the eye; the effect of the steel being there, a man would be more liable to get infection of the eye, but, once your infection is in there, you will lose the eye from the gonorrhea infection. It does not make any difference how it gets in there, you will lose the sight partially or complete.

The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose "out of and in the course of his employment" rests upon the claimant. *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Ruegg on Workmen's Compensation*, p. 343, says: "If an inference favorable to the applicant can only be arrived at by a guess, the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them."

*Boyd on Workmen's Compensation*, § 559, says: "The workman carries the burden of proving that his injury was caused by the accident, and, where he fails to do so, and where the evidence as to the cause of the injury is equally consistent with an accident, and with no accident, compensation may not be awarded him."

In the instant case it is not reasonable to say that he would not have rubbed his eye if the steel had not lodged there. He might not have rubbed his eye, it is true; but it is



just as reasonable to suppose that he might have had occasion to rub his eye without this particular inciting cause. By the medical testimony it conclusively appears that the infection could have taken place if the steel had not been there. It must be said, from this record, that the loss of the eye was directly and immediately due to the in-

fection caused by the gonorrhea, which it cannot be claimed is a risk incident to the employment. We are of the opinion that the facts are not capable of supporting the inference that the injury arose out of and in the course of the employment.

The decision of the Industrial Accident Board is reversed, with costs to appellant.

### Annotation—Recovery of compensation for loss of eye through infection.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

Compensation is recoverable only for injuries or incapacity "arising out of and in the course of" the employment; consequently, if the injury to an eye is the result of an infection from a source not in any way connected with the employment, compensation is properly denied.

MCCOY v. MICHIGAN SCREW CO. is a good example of this character of cases. The injury to the eye was comparatively slight, and the resulting incapacity would also undoubtedly have been slight but for the fact that germs of a disease from which the workman was suffering at the time of the injury were carried to the eye by the workman's hand.

The English case of *Bellamy v. Humphries* [1913] W. C. & Ins. Rep. (Eng.) 169, 6 B. W. C. C. 53, is to the same effect. Here it was held that where a microbe from some source not connected with the employment enters the eye and sets up inflammation, the arbitrator is justified in holding that the employers are not liable for compensation for the resulting incapacity, although the workman had previously gotten harmless dust into his eye, and by rubbing it had caused an abrasion, rendering the action of the microbe more serious.

An award of compensation was set aside in *Voelz v. Industrial Commission* (1915) — Wis. —, 152 N. W. 830, where a plumber, while lying on his back, at work on the hot water cock of a wash basin in a private residence, was struck in the eye by a "something" which caused acute pain and impelled him to rub his eye, which became inflamed, and gonorrheal infection followed, resulting in the loss of the sight of the eye. It was satisfactorily shown that the workman was not suffering from any gonorrheal infection at the time of the injury, but the award was set aside as being based on mere conjecture or surmise, since the Commission said in their finding that the substance which fell in the eye might have been infected, or "with the eye inflamed it might become infected by rubbing it with an infected cloth, or washing it in infected water, or in other ways." The court called especial attention to the fact that the workman was not working on the waste pipe or any pipe which takes water away from the wash bowl, but on the cock which supplied clean water to the bowl. The court, however, went on to say: "If the Commission had found as a fact that the infection came from the substance that dropped in the eye, it might be difficult to say that there was no evidence to support the finding; but they did not so find; on the contrary, they reached the conclusion which seems to us eminently reasonable and logical that it might have come from this source, and might also have come from a number of outside sources."

If the injury to the eye, however, is the direct result of foreign particles which get into the eye while the workman is engaged in his regular duties, then such loss or injury may be said to be an accident for which compensation is recoverable, although the injury may have been aggravated by the workman rubbing his eye.

Thus, a workman suffered injury by accident where bran dust containing grit got into his eyes, and by rubbing them an abrasion was caused which necessitated the removal of one eye, and affected the sight of the other eye. *Adams v. Thompson* (1911) 5 B. W. C. C. (Eng.) 19.

It has been held by the House of Lords, sustaining the court of appeal, that a workman whose eye becomes infected with anthrax while engaged in handling wool suffers an accident within the meaning of the compensation act. *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 475, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 244, 2 Ann. Cas. 137, affirming [1904] 1 K. B. (Eng.) 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 660, 20 Times L. R. 129. This decision was handed down before the act was extended to embrace industrial diseases, and from the language

used by the judges delivering judgment it appears to be a very extreme case, and might be cited as a precedent for awarding compensation in any case of the contracting of an industrial disease. It would seem that the decision could only be explained upon the theory that the learned judges believed that the

bacillus of anthrax was something so tangible that the impact of such a bacillus with a portion of the human body could be compared with the impact of some material object, such as sand or a particle of steel. This decision is discussed at length in the annotation, ante, 37.

W. M. G.

## WISCONSIN SUPREME COURT.

CITY OF MILWAUKEE, Appt.,

v.

MINNIE ALTHOFF, by Guardian et al.,  
Repts.

(156 Wis. 68, 145 N. W. 238.)

### Master and servant — workmen's compensation act — injury while proceeding to place of employment.

An injury to a city employee who, after reporting according to custom for instruction as to where he is to work during the day, falls on the sidewalk while on his way toward such place, grows out of and is incidental to his employment within the meaning of a workmen's compensation act, although it occurs before the hours when his regular duties for the day begin.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(February 3, 1914.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Dane County affirming an award of the Industrial Commission, under the workmen's compensation act, in favor of plaintiff Althoff for the death of her father. Affirmed.

Statement by **Barnes, J.:**

The appeal is from a judgment affirming an award of \$2,138.11, made in favor of Minnie Althoff by the Industrial Commission under the workmen's compensation act, against the city of Milwaukee, on account of the death of William A. Althoff, the father of said Minnie Althoff. The deceased was employed by the city at an agreed compensation of \$2 per day. His hours of labor were fixed at eight hours a day by an ordinance of the city, and he began work at 8 o'clock in the morning and finished at 5 in the afternoon. He was required to report to his foreman at 7:30 o'clock each morning to receive instructions as to where he was to work during the day, so that he might

reach his place of employment at 8 o'clock. He reported, according to custom, on the morning of May 3, 1912, and, after receiving instructions as to where he was to work, proceeded toward the place. While on his way he fell on a sidewalk and injured his knee. He died on September 21, 1912, and it was found on sufficient evidence that his death was due to the injury which he received when he fell.

Messrs. Daniel W. Hoan and William H. Timlin, Jr., for appellant:

A party is not entitled to compensation under the compensation act when he is injured, not in working, but in walking along the street, going to a place at which he is to do some work, the injury being caused by an alleged defect.

*Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955, 92 N. W. 280.

When an employee reports at 7:30 A. M., for the purpose of ascertaining where he shall work that day, and his work does not commence until 8 o'clock, no matter when he reaches his work,—such employee is not, when going to such place of work, and walking upon the streets, injured by reason of an accident arising out of and incidental to his employment.

26 Cyc. 969; *Walters v. Stavele Coal & I. Co.* 105 L. T. N. S. 54, 55 Sol. Jo. 579, 4 B. W. C. C. 303; *Anderson v. Fife Coal Co.* [1910] S. C. 8, 47 Scot. L. R. 5, 3 B. W. C. C. 539; *Perry v. Anglo-American Decorating Co.* 3 B. W. C. C. 310; *Kane v. Merry & Cunninghame* [1911] S. C. 533, 48 Scot. L. R. 430, 4 B. W. C. C. 379; *Whitehead v. Reader* [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387, 3 W. C. C. 40; *Kerr v. William Baird & Co.* [1911] S. C. 701, 48 Scot. L. R. 646, 4 B. W. C. C. 397; *McDaid v. Steel* [1911] S. C. 859, 48 Scot. L. R. 765, 4 B. W. C. C. 412; *Traynor v. Robert Addie & Sons*, 48 Scot. L. R. 820, 4 B. W. C. C. 357; *Barnes v. Nunnery Colliery Co.* [1910] W. N. 248, 45 L. J. N. C. 757, 4 B. W. C. C. 43; *Jenkinson v. Harrison A. & Co.* 4 B. W. C. C. 194; *Lowe v. Pearson* [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124, 1 W.

**Note.**—As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for injuries while going to and from work, see annotation, post, 331.  
L.R.A.1916A



C. C. 5; *Conway v. Pumpherson Oil Co.* [1911] S. C. 660, 48 Scot. L. R. 632, 4 B. W. C. C. 392; *Harding v. Brynddu Colliery Co.* [1911] 2 K. B. 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269.

Messrs. **W. C. Owen**, Attorney General, and **Byron H. Stebbins**, Assistant Attorney General, for respondent Industrial Commission:

The finding of the Industrial Commission that August Althoff was injured "while engaged in performing service growing out of and incidental to his employment" is final and conclusive.

*Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527; *State ex rel. McManus v. Policemen's Pension Fund*, 138 Wis. 133, 20 L.R.A. (N.S.) 1175, 119 N. W. 806; *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 514, 21 L. ed. 705, 707; *Wood, Mast. & S.* § 404.

The decision of the Industrial Commission is correct on the undisputed facts.

*Jesson v. Bath*, 113 L. T. N. S. 206, 4 W. C. C. 9; *M'Neice v. Singer Sewing Mach. Co.* [1911] S. C. 13, 48 Scot. L. R. 15, 4 B. W. C. C. 351; *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242; *Refuge Assur. Co. v. Millar*, 49 Scot. L. R. 67; *Nelson v. Belfast Corp.* 42 Ir. Law Times, 223, 1 B. W. C. C. 158.

The relation of master and servant is not limited to the time that the latter is actually engaged in work, but includes a reasonable time before he commences and after he ceases such work.

*Ewald v. Chicago & N. W. Co.* 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; *McGregor v. Auld*, 83 Wis. 539, 53 N. W. 845; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172; *Charron v. Northwestern Fuel Co.* 149 Wis. 240, 49 L.R.A. (N.S.) 162, 134 N. W. 1048, Ann. Cas. 1913C, 939; *Pool v. Chicago, M. & St. P. R. Co.* 53 Wis. 657, 11 N. W. 15, 56 Wis. 227, 14 N. W. 46.

The relation of master and servant exists when the servant is under the master's control and subject to his orders.

5 *Labatt, Mast. & S.* p. 5425; 26 Cyc. 1088; *East Line & R. River R. Co. v. Scott*, 71 Tex. 703, 10 Am. St. Rep. 804, 10 S. W. 298; *Harvey v. Texas & P. R. Co.* 92 C. C. A. 237, 166 Fed. 385; *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529; *Broderick v. Detroit Union R. L.R.A.* 1916A.

*Station & Depot Co.* 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; *Taylor v. George W. Bush & Sons Co.* 12 L.R.A. (N.S.) 853, and note, 6 Penn. (Del.) 306, 66 Atl. 884; *Powers v. Calcasieu Sugar Co.* 48 La. Ann. 483, 19 So. 455; *Sharp v. Johnson & Co.* [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 567, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482; *Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105; *Hoskins v. Lancaster*, 26 Times L. R. 612, 3 B. W. C. C. 476; *Perry v. Anglo-American Decorating Co.* 3 B. W. C. C. 310; *Fitzpatrick v. Hindley Field Colliery Co.* 3 W. C. C. 37, 4 W. C. C. 7; *Lowry v. Sheffield Coal Co.* 24 Times L. R. 142, 1 B. W. C. C. 1; *Riley v. William Holland & Sons* [1911] 1 K. B. 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155.

Mr. **Max P. Kufalk** for respondent Althoff.

**Barnes, J.**, delivered the opinion of the court:

The appellant contends that it is not liable for injuries received by one of its employees while on his way to work, that the relation of master and servant did not exist when deceased was injured, and that if there is any liability on the part of the city, it arises out of § 1339, Stat.

Section 2394—4, Stat. 1911, provides for liability for compensation "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." The material questions in the case are: Did the relation of master and servant exist when the accident occurred? And, if so, was Althoff performing a service growing out of and incidental to his employment? There is no dispute on the evidence pertaining to these questions, and they involve propositions of law rather than matters of fact.

The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed. *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591; *Helmke v. Thilmany*, 107 Wis. 216, 221, 83 N. W. 360, 8 Am. Neg. Rep. 172; *Pool v. Chicago, M. & St. P. R. Co.* 53 Wis. 657, 11 N. W. 15; *Kunza v. Chicago & N. W. R. Co.* 140 Wis. 440, 123 N. W. 403.

The courts very generally hold that the relation of master and servant exists when the servant is under the master's control and subject to his direction. 5 *Labatt, Mast. & S.* 5425, § 1806; *Harvey v. Texas & P. R. Co.* 92 C. C. A. 237, 166 Fed. 385;

Taylor v. George W. Bush & Sons Co. 6 Penn. (Del.) 306, 12 L.R.A. (N.S.) 853, 66 Atl. 884; St. Louis, A. & T. R. Co. v. Welch, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529; Powers v. Calcasieu Sugar Co. 48 La. Ann. 483, 19 So. 455.

Such seems to be the holding of the English courts under a substantially similar provision of the English workmen's compensation act. Sharp v. Johnson & Co. [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 566, 567, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105; Hoskins v. Lancaster, 26 Times L. R. 612, 3 B. W. C. C. 476; Fitzpatrick v. Hindley Field Colliery Co. 3 W. C. C. 37; Lowry v. Sheffield Coal Co. 24 Times L. R. 142, 1 B. W. C. C. 1; Riley v. William Holland & Sons [1911] 1 K. B. 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155; Holmes v. Great Northern R. Co. [1900] 2 Q. B. 409, 69 L. J. Q. B. N. S. 854,

64 J. P. 532, 48 Week. Rep. 681, 83 L. T. N. S. 44, 16 Times L. R. 412.

In the instant case, when the servant reported to his foreman and received his instructions for the day, and proceeded to carry out these instructions by starting for the place where he was to work, we think the relation of master and servant commenced, and that in walking to the place of work the servant was performing a service growing out of and incidental to his employment.

The liability provided for by the compensation act is in lieu of any other liability whatsoever, and the remedy under it is exclusive. Stat. 1911, § 2394—4. Holding as we do that the relation of master and servant existed, and the parties being subject to the compensation act, the remedy of the claimant is under that act, and not under § 1339, Stat.

Judgment affirmed.

Siebeck and Timlin, JJ., took no part.

## WEST VIRGINIA SUPREME COURT OF APPEALS.

C. DE CONSTANTIN, Consul on Behalf of Dependents of Guiseppe Zippi, Deceased, v.

PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

(— W. Va. —, 83 S. E. 88.)

### Courts — jurisdiction — acts of Public Service Commission.

1. The jurisdiction to review acts of the Public Service Commission, respecting the administration of the workmen's compensation fund, conferred upon the supreme court of appeals by § 43 of chapter 10 of the Acts of 1913 (Code 1913, chap. 15p, § 699), is original, not appellate.

For other cases, see *Public Service Commissions*, in *Dig. 1-52 N. S.*

### Master and servant — workmen's compensation — injury on way to work.

2. An injury incurred by a workman in the course of his travel to his place of work, and not on the premises of the employer, does not give right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract

of employment of its use by the servant in going to and returning from his work.

For other cases, see *Master and Servant*, II, a, 1, in *Dig. 1-52 N. S.*

(September 29, 1914.)

**A**PPPLICATION for an order requiring the Public Service Commission to allow a rejected claim made on behalf of the dependents of Guiseppe Zippi, deceased, to participate in the workmen's compensation fund. Order refused.

The facts are stated in the opinion.

Messrs. Joseph W. Henderson and Francis Rawle, for plaintiff:

The accident resulted from the employment and arose in the course of the employment.

Holness v. Mackay [1899] 2 Q. B. 319, 68 L. J. Q. B. N. S. 724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 Times L. R. 351, 1 W. C. C. 13; Hoskins v. Lancaster, 26 Times L. R. 612, 3 B. W. C. C. 476; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486.

Messrs. A. A. Lilly, Attorney General, and Frank Lively, Assistant Attorney General, for defendant:

The injury causing death was not received in the course of and resulting from the employee's employment, as provided in § 25 of the workmen's compensation act.

Headnotes by POFFENBARGER, J.

**Note.**—As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to recovery of compensation for injuries while going to and from work, see annotation, post, 331.

L.R.A.1916A.



Ruegg, *Employers' Liability*, 377; *Gilmour v. Dorman, L. & Co.* 105 L. T. N. S. 54, 4 B. W. C. C. 279; *Holness v. Mackay* [1899] 2 Q. B. 319, 68 L. J. Q. B. N. S. 724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 Times L. R. 351, 1 W. C. C. 13; *Walters v. Staveley Coal & I. Co.* 105 L. T. N. S. 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303; *Caton v. Summerlee & M. Iron & Coal Co.* 39 Scot. L. R. 762, 4 Sc. Sess. Cas. 5th series, 989, 10 Scot. L. T. 204; *Boyd, Workmen's Compensation*, § 186; *Harper, Workmen's Compensation*, § 34; 1 *Bradbury, Workmen's Compensation*, p. 404; *McLaren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492; *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Graham v. Barr* [1913] S. C. 538 [1913] W. C. & Ins. Rep. 202, 50 Scot. L. R. 391, 6 B. W. C. C. 416.

**Poffenbarger, J.**, delivered the opinion of the court:

The rejection of the claim to right of participation in the workmen's compensation fund, made on behalf of the dependents of Guiseppe Zippi, by the acting royal consul of Italy, is the occasion of this first application to this court for the exercise of its supervisory powers over the Public Service Commission respecting its administration of that fund. This proceeding is authorized by a statute different from the one under which *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931, was instituted, but the constitutional provisions referred to in the opinion in that case render it impossible to treat this one as an ordinary appeal, or bring it within the appellate jurisdiction of this court. What the statute (§ 43 of chapter 10 of the Acts of 1913, Code 1913, chap. 15p (§ 699) denominates an appeal must, if possible, be regarded as a right given to a claimant to participation in the fund in question, to apply to this court for the exercise of its original jurisdiction. Any other construction would render the provision unconstitutional. The Commission itself is not a court. It is only an administrative board, possessing quasi judicial and legislative powers. *United Fuel Gas Co. v. Public Service Commission*, cited. Its powers in the administration of the workmen's compensation fund are not substantially different from its powers over other matters within its control; and the principles upon which the jurisdiction of this court over its acts, by original process, was sustained in the case just cited, determine the jurisdictional question now presented.

Only the claimant to participation in such fund can apply to this court for such relief, and he is permitted to do so only in those L.R.A.1916A.

instances in which the Commission, by its final action, has denied to him such right, upon some ground going to the basis of his claim, such as self-infliction of the injury, of which he complains, or incurrence of the injury otherwise than in the course of his employment. As the Commission itself and the fund are creatures of the legislative will, it was competent for the legislature to deprive the Commission of all discretionary power respecting the right of participation, and make it a purely legal question. In other words, it could make it mandatory upon the Commission to allow participation, if the injury arose out of and in the course of employment, and was not self-inflicted, and deny to the Commission the right to determine what constitutes self-inflicted injury or an injury incurred otherwise than in the course of employment, and whether the claimant is a dependent of the injured person, by making all such questions arising upon the facts disclosed questions of law for determination by this court, in the exercise of its supervisory power over officers and inferior tribunals. In this manner jurisdiction has been conferred upon this court to order allowance of such claims, as it would in the cases of formal applications for writs of mandamus. As to this question, the legislature conferred only ministerial power upon the Commission.

In the opinion of the Commission, the injury by which Zippi's death was occasioned did not arise out of his employment, nor was it incurred in the course thereof. He was an employee of Kefauver & McLaran, contractors, engaged in construction work on some portion of the Baltimore & Ohio Railroad. Just what the relation of this work to the main line of the railroad was is not shown, but Zippi was not killed on the construction work. His death occurred on the main line, and it is supposed to have resulted from his having stepped in front of one train in an effort to escape another. The inspector's report and other evidence are to the effect that he was walking on the main double track in going to his work. A statement of the case, prepared by a claim clerk, says his only way of access to his work was by way of the main line; but this statement is not sustained by evidence. The inspector's report does not show it, nor is there any other evidence bearing on the question. In the brief filed for the petitioner it is said Zippi was killed only a few minutes before the usual hour for the commencement of actual work, 7 o'clock A. M., the accident having occurred at 6:55 A. M.; but no evidence shows at what time he would have commenced his work.

If it had been shown that the decedent, approaching his place of work by the only

means of access thereto, was almost within the reach of it at the time of his injury, some of the authorities relied upon might justify the allowance of the claim; for the employment is not limited to the exact moment of arrival at the place of actual work, nor to the moment of retirement therefrom. It includes a reasonable amount of time before and after actual work. *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42; *McKee v. Great Northern R. Co.* 42 Ir. Law, Times 132, 1 B. W. C. C. 165 *Bradbury, Workmen's Compensation*, pp. 404-407. A reasonable time after the termination of actual work is allowed. If a workman is injured on the premises of the employer, and while leaving his place of actual work by the usual course of travel, the injury is deemed to have arisen out of the employment. *Kinney v. Baltimore & O. Employees' Relief Asso.* 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8. Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer, and by the only way of access, or the one contemplated by the contract of em-

ployment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work, and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment by the requirement of its use by the employee, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employee, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof.

As the evidence adduced in support of the claim did not, for the reasons already stated, bring it within the principles here referred to, the Commission properly rejected the claim, and the prayer for an order, requiring allowance thereof, cannot be granted.

### **Annotation—Recovery of compensation for injuries received while going to and from work.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

In the absence of special circumstances the act does not apply to a workman going to or from his work. *Edwards v. Wingham Agri. Implement Co.* [1913] 3 K. B. (Eng.) 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50 [1913] W. N. 221, 57 Sol. Jo. 701, 6 B. W. C. C. 511; *Kelly v. The Foam Queen* (1910) 3 B. W. C. C. (Eng.) 113; *Poulton v. Kelsall* [1912] 2 K. B. (Eng.) 131, 81 L. J. K. B. N. S. 774, 106 L. T. N. S. 522, 28 Times L. R. 329, [1912] W. C. Rep. 295 [1912] W. N. 98, 5 B. W. C. C. 318; *Davies v. Rhymney Iron Co.* (1900) 16 Times L. R. (Eng.) 329, 2 W. C. C. 22; *Nolan v. Porter* (1909) 2 B. W. C. C. (Eng.) 106; *Hills v. Blair* (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409.

But undoubtedly such accident might be brought within the scope of the employment by the terms of the contract of employment. *DE CONSTANTIN v. PUBLIC SERVICE COMMISSION*; *Fumiciello's* L.R.A.1916A.

*Case* (1914) 219 Mass. 488, 107 N. E. 349; *Donovan's Case* (1914) 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549.

So, a miner injured while riding from his home to the mine on a train provided by the employer in accordance with the terms of the contract of employment suffers injury from accident arising out of the employment. *Cremins v. Guest* [1908] 1 K. B. (Eng.) 469, 77 L. J. K. B. N. S. 326, 24 Times L. R. 189, 98 L. T. N. S. 335, 1 B. W. C. C. 160; *Walton v. Tredegar Iron & Coal Co.* [1913] W. C. & Ins. Rep. (Eng.) 457, 6 B. W. C. C. 592.

Ordinarily the employment is held to begin in the ordinary course only when the time for work has arrived and the locality has been reached at which the work is to be performed. *Anderson v. Fife Coal Co.* (1910) 47 Scot. L. R. 3 [1910] S. C. 8, 3 B. W. C. C. 539; *Whitebread v. Arnold* (1908) 99 L. T. N. S. (Eng.) 103; *Holness v. Mackay* [1899] 2 Q. B. (Eng.) 319, 68 L. J. K. B. N. S.



724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 L. T. N. S. 831, 15 Times L. R. 351.

In a Scotch case recovery was denied where a workman who, after the conclusion of his day's work, was walking along a private railway track belonging to his master, was run over at a point about 230 yards from the place where he worked. *Caton v. Summerlee & M. Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 989; 39 *Scot. L. R.* 762, 10 *Scot. L. T.* 204.

A workman does not suffer injury by accident arising out of and in the course of his employment where he is injured on his way home from work along a public footpath, although the path had been dedicated to the public by the employers, over whose land it ran. *Williams v. Smith* (1913) 108 L. T. N. S. (Eng.) 200 [1913] W. C. & Ins. Rep. 146, 6 B. W. C. C. 102.

A workman whose duties were entirely underground did not suffer injury by accident arising out of and in the course of his employment where he was injured after he had finished his day's work, and was above ground at a place about 400 feet from the shaft's mouth, and 280 yards from the colliery office. *Graham v. Barr* [1913] S. C. 538, 50 *Scot. L. R.* 391 [1913] W. C. & Ins. Rep. 202, 6 B. W. C. C. 412.

Compensation is not recoverable where a workman had concluded his day's work and was injured while riding to his home on a bicycle, along the main road. *Edwards v. Wingham Agri. Implement Co.* [1913] 3 K. B. (Eng.) 596, 82 L. J. K. B. N. S. 998, 109 L. T. N. S. 50 [1913] W. N. 221, 57 Sol. Jo. 701, 6 B. W. C. C. 511.

It has been said, however, that the moment that actual work begins cannot be taken as the true moment of the commencement of the employment for the purposes of the act. *Cross v. Catteral*, an unreported decision of the House of Lords cited in *Hoskins v. Lancaster* (1910) 26 Times L. R. (Eng.) 612, 3 B. W. C. C. 476. In *Lawless v. Wigan Coal & I. Co.* (1908) 124 L. T. Jo. (Eng.) 532, 1 B. W. C. C. 153, the court said: "The authorities clearly decide that if a workman arrives at the master's premises where he is employed at, or within a reasonable margin before, the time at which he is due to commence work, and, whilst physically engaged in making his way from the entrance of the master's premises to the place where he works, meets with an accident, it is open to the judge to say that the accident arose out of and in the course of his employment." L.R.A.1916A.

It is not necessary that the hour of work shall have arrived and that the work has itself been actually begun. *Hills v. Blair* (1914) 182 *Mich.* 20, 148 N. W. 243, 7 N. C. C. A. 409; *MILWAUKEE v. ALTHOFF*, ante, 327.

And the moment that the actual work stops cannot be considered in every case as the time of the termination of the employment. *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. (Eng.) 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42.

On the one hand, it has been held that it is not a sufficient test that the workman is on the premises of the employer. *Hills v. Blair* (*Mich.*) supra. On the other hand, the circumstance that the deceased employee was not upon the estate of his employer at the time of receiving his injury has been said to be of slight significance. *Re McPhee* (1915) — *Mass.* —, 109 N. E. 633.

An accident to a workman, caused by slipping on some ice at a point a quarter of mile from the place of work, does not arise out of and in the course of the employment, although he was on the employer's premises at the time. *Gilmour v. Dorman* (1911) 105 L. T. N. S. (Eng.) 54, 4 B. W. C. C. 279.

A miner who, on going to his place of work, takes, with the employer's permission, a short cut over the employer's premises, and slips on some steps three quarters of a mile from the place of work, does not suffer injury by accident arising out of and in the course of his employment. *Walters v. Staveley Coal & I. Co.* (1911; H. L.) 105 L. T. N. S. (Eng.) 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303.

Recovery may be had for an accident occurring before the place of work has been reached, if, during the antecedent period within which it occurred, the servant was, as a matter of fact, under the master's control. *Holmes v. Great Northern R. Co.* [1900] 2 Q. B. (Eng.) 409, 83 L. T. N. S. 44, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 16 Times L. R. 412; *Mackenzie v. Coltness Iron Co.* (1904) 6 Sc. Sess. Cas. 5th series (*Scot.*) 8; *Fitzpatrick v. Hindley Field Colliery Co.* (1901) 4 W. C. C. (Eng.) 7.

Where employees came to their work by a train which arrived about twenty minutes before the actual work began, and, to the knowledge of the employer, customarily spent the twenty minutes in getting refreshments in a cabin maintained by the employer for them, a workman who, while proceeding to deposit his

ticket at the ticket office, as he was required to do by the rules of the employer, fell into an excavation near the ticket office about twenty minutes before the work was to begin, was injured by acci-

dent arising out of and in the course of his employment. *Sharp v. Johnson* [1905] 2 K. B. (Eng.) 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 21, 21 Times L. R. 482. W. M. G.

# MASSACHUSETTS SUPREME JUDICIAL COURT.

## STANDARD ACCIDENT INSURANCE COMPANY, Appt.

CHARLES J. SPONATSKI, Deceased, Employeee.

ELLEN V. SPONATSKI, Dependent, Widow.

LUNDIN STEEL CASTING COMPANY, Employer.

(220 Mass. 526, 108 N. E. 466.)

## Evidence — burden of proof — workmen's compensation act.

1. Claimants under the workmen's compensation act have the burden of establishing by the preponderance of evidence the essential facts necessary to warrant payment of compensation under the act.

*For other cases, see Evidence, II. b, in Dig. 1-52 N. S.*

## Master and servant — workmen's compensation act — suicide — irresistible impulse.

2. Compensation is recoverable under the workmen's compensation act for death of a workman by throwing himself from a window, as the result of injuries arising out of and in the course of his employment, which deranged his mind so as to create an irresistible impulse to commit the act which caused death.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(March 31, 1915.)

**A**PPEAL by insurer from the findings of the Industrial Accident Board confirming the award of the committee of arbitration in a proceeding by a dependent widow under the workmen's compensation act to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Messrs. Dickson & Knowles, for appellant:

Compensation was not recoverable under the workmen's compensation act for the death of the dependent's husband.

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to applicability of compensation acts where insane workman commits suicide or suffers personal injuries, see annotation, post, 339.

L.R.A.1916A.

*Daniels v. New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424; 25 Harvard L. Rev. 303; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Carter v. Towne*, 103 Mass. 507; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; *Horan v. Watertown*, 217 Mass. 185, 104 N. E. 464; *Bohaker v. Travelers' Ins. Co.* 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; *Dunham v. Clare* [1902] 2 K. B. 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645; *Southall v. Cheshire County News Co.* 5 B. W. C. C. 251; *Malone v. Cayzer* [1908] S. C. 479, 1 B. W. C. C. 27, 45 Scot. L. R. 351.

The burden is upon the department to prove that the death of her intestate resulted from the injury which he received on September 17, 1913, and if she fails to sustain the burden of proof, then she is not entitled to recover. She has the burden of proving this not necessarily by direct evidence, for it is quite well established that inferences of fact may be drawn by the court. But when the facts are such that it is equally probable that there was and there was not an injury resulting in death arising out of and in the course of the deceased's employment, then plaintiff cannot recover.

*Barnabas v. Bersham Colliery Co.* 102 L. T. N. S. 621, 3 B. W. C. C. 216, 103 L. T. N. S. 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119, 48 Scot. L. R. 727; *Hewitt v. The Duchess* [1910] 1 K. B. 772, 79 L. J. K. B. N. S. 867, 102 L. T. N. S. 204, 26 Times L. R. 300, 54 Sol. Jo. 325, 3 B. W. C. C. 239, [1911] A. C. 671, 81 L. J. K. B. N. S. 33, 105 L. T. N. S. 121, 55 Sol. Jo. 598, 4 B. W. C. C. 317; *Marshall v. The Wild Rose* [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514, 11 Asp. Mar. L. Cas. 409, 48 Scot. L. R. 701; *Thackway v. Connelly*, 3 B. W. C. C. 37; *Hawkins v. Powell's Tillery Steam Coal Co.* [1911] 1 K. B. 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 385, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178; *Walker v. Murray* [1911] S. C. 825, 48 Scot.



L. R. 741, 4 B. W. C. C. 409; Jenkins v. Standard Colliery Co. 105 L. T. N. S. 730, 28 Times L. R. 7, 5 B. W. C. C. 71; Charvil v. Manser & Co. 5 B. W. C. C. 385; Lendrum v. Ayr Steam Shipping Co. [1913] S. C. 331, 50 Scot. L. R. 173, 6 B. W. C. C. 326; Dyhouse v. Great Western R. Co. 109 L. T. N. S. 193, 6 B. W. C. C. 691; Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1, 51 Scot. L. R. 861; Woods v. Thomas Wilson, Sons & Co. 29 Times L. R. 726, 6 B. W. C. C. 750; Fenton v. J. Thorley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1; Trim Joint Dist. School v. Kelly [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. Law Times, 141, 7 B. W. C. C. 274.

Under the English act, if one exposes himself to a risk unconnected with the employment, which neither of the parties to the contract of service could have reasonably contemplated as properly belonging or incidental to it, the dependent is not entitled to recover, and the mere fact that the work that is being done is for the employer's interest, and not for the employee, does not necessarily make the master liable.

Brice v. Lloyd [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26; Martin v. Fullerton & Co. [1908] S. C. 1030, 45 Scot. L. R. 812, 1 B. W. C. C. 168; McDaid v. Steel [1911] S. C. 859, 48 Scot. L. R. 765, 4 B. W. C. C. 412; Parker v. Pout, 105 L. T. N. S. 493, 5 B. W. C. C. 45; Powell v. Bryndu Colliery Co. 5 B. W. C. C. 124; Barnes v. Nunnery Colliery Co. [1912] A. C. 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195; Revie v. Cumming [1911] S. C. 1032, 48 Scot. L. R. 831, 5 B. W. C. C. 483; Halvorsen v. Salvesen [1912] S. C. 99, 49 Scot. L. R. 27, 5 B. W. C. C. 519; Whiteman v. Clifden, 6 B. W. C. C. 49; Wemyss Coal Co. v. Symon [1912] S. C. 1239, 49 Scot. L. R. 921, 6 B. W. C. C. 298; Guilfoyle v. Fennessy, 47 Ir. Law Times, 19, 6 B. W. C. C. 453; Plumb v. Cobden Flour Mills Co. 108 L. T. N. S. 161, 29 Times L. R. 232, 57 Sol. Jo. 264, 6 B. W. C. C. 245.

Messrs. James F. Creed and John J. Mansfield for appellee.

Rugg, Ch. J., delivered the opinion of the court:

The deceased employee received an injury in the course of and arising out of his employment through a splash of molten lead into his eye on September 17, 1913. He was L.R.A.1916A.

treated at a hospital until October 13, 1913, when, as was found by the Industrial Accident Board, "while insane as a result of his injury, he threw himself from a window and was fatally injured." The Board found further that "this insanity was brought about and resulted from the injury," and that, while the evidence was very close upon that point, the death "did result from 'an uncontrollable impulse and without conscious volition to produce death,'" under Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424. The arbitration committee, whose findings were affirmed and adopted by the Industrial Accident Board, put it this way: "We find and decide as a fact that the accident injured the eyesight of the deceased, caused the loss of his eye, caused a nervous and mental derangement, caused insane hallucinations, and caused him, while mentally deranged, in a state of insanity and under the influence of hallucination, by an irresistible impulse, to commit suicide, and that the accident was the sole, direct, and proximate cause of the suicide."

The insurer contends that these findings are not warranted by the evidence. That question is open to it, for the substance of the evidence is reported. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516.

The burden of proving the essential facts necessary to establish a case warranting the payment of compensation rests upon the dependent in a case arising under the workmen's compensation act as much as it does upon a plaintiff in any proceeding at law. The dependent must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess, or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim, before the dependents can succeed. The elements that need to be proved are quite different from those in the ordinary action at law or suit in equity, but, so far as these elements are essential, they must be proved by the same degree of probative evidence. Of course this does not mean, as was said by Lord Loreburn in Marshall v. The Wild Rose [1910] A. C. 486, 3 B. W. C. C. 514, "that he must demonstrate his case. It only means, if there is no evidence in his favor upon which a reasonable man can act, he will fail." If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his favor on the vital points, then his case is proved.

But the rational mind must not be left in such uncertainty that these essential elements are not removed from the realm of fancy. *Plumb v. Cobden Flour Mills Co* [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1, 51 Scot. L. R. 861; *Barnabas v. Bersham Colliery Co.* 103 L. T. N. S. 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119, 48 Scot. L. R. 727 (House of Lords); *Fletcher v. The Dutchess* [1911] A. C. 671, 81 L. J. K. B. N. S. 33, 105 L. T. N. S. 121, 55 Sol. Jo. 598, 4 B. W. C. C. 317. See also *Childs v. American Exp. Co.* 197 Mass. 337, 84 N. E. 128; *Bigwood v. Boston & N. Street R. Co.* 209 Mass. 345, 35 L.R.A. (N.S.) 113, 95 N. E. 751. The board adopted rulings and thereby instructed itself as matter of law in accordance with the substance of these propositions as requested by the insurer, and no error is shown in this regard.

There was evidence tending to show that, although for a time after the injury the deceased was in his normal temperament, which was hopeful and joyous, he then became silent and moody, and was depressed, and suffered from certain marked hallucinations. He did not appear affectionate as he always theretofore had been toward his wife and young children. There were two witnesses of the event which directly produced his death. One gave the following description: "That morning I was making my first visit to the ward. . . . Mr. Sponatski was sitting on the window sill leaning against the frame and his feet were up against the other side. The window was open and he was looking out and I spoke to him and asked him to come down. He turned around and gave me a kind of wild look. I thought he was getting off the window sill. He let one foot down and raised up on the other knee and at that he got up on the window sill and leaped right out. . . . It happened very quick. . . . He had a wild look; he looked as if he was frightened. . . . He appeared as if he had just woke up out of a deep thought. Kind of wild."

The other said that after he was spoken to, "he hesitated a few minutes; he looked as blank; he was undecided what to do; [he had] a very wild, glassy look. He didn't seem to act as though he heard at all,—just looked blank. . . . He had a vacant stare as though he didn't see you,—as though he was picturing things he didn't see; things in his imagination. He didn't pay a bit of attention to us at all,—just as if you were not there."

The medical examiner who made a post mortem examination of the brain testified

that the deceased "did not have any form of insanity, except possibly general paresis, but for any other form I could not express an opinion."

An alienist of experience testified that probably there was developed from the accident a "mental disturbance" accompanied by "delusions and hallucinations," and as a result committed suicide. After his death a letter, which the Board decided was written by him was found under his pillow, as follows:

My wife folks are not to blame for anything my wife was a pur woman when I married her she be is pure to this day it is all my own fault.

[Signed] Martin Sponatski.

Aside from this there was no evidence tending to show that he had contemplated suicide, or that the jumping from the window was the exercise of even a "moderately intelligent power of choice." *Daniels v. New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424.

The letter does not seem to us necessarily indicative of a suicidal purpose. It was not signed by the name of the deceased, which was Charles J. Sponatski. It apparently was wholly the product of a disordered intellect. It is as consistent with some other phantom of an unbalanced imagination as it is with a volition to end his life. The circumstances of the leap from the window as narrated by all the eye-witnesses point rather to ungovernable lunacy than to the volition even of a diseased mind. The finding in this respect, although hanging on a rather slender thread of evidence, is not unsupported. Therefore it must stand.

This decision rests upon the rule established in *Daniels v. New York, N. H. & H. R. Co. supra*. That rule applies to cases arising under the workmen's compensation act. It is that where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy, "without conscious volition to produce death, having knowledge of the physical nature and consequences of the act," then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act, even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which



breaks the chain of causation arising from the injury. See *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768.

The Industrial Accident Board was in error in adopting a ruling, and thereby instructing itself: "That the rule laid down in the Daniels Case is not the rule to be followed under the workmen's compensation act. In other words the question is not whether the consequence is a reasonable and probable one, but whether the consequence resulted from the injury."

No question of negligence in its common-law sense, or of reasonable and probable consequence, was involved or discussed in the Daniels Case. That was an action brought under Pub. Stat. chap. 112, § 213, now Stat. 1906, chap. 463, pt. 2, § 245, to recover damages for conscious suffering and death caused by failure on the part of the defendant railroad to give the statutory signals of warning where a railroad crossed a highway at grade. Under that statute the liability of the railroad is made out when the fact of failure to give the statutory signals is established (unless a special defense prevails).

The inquiry as to reasonable and probable consequences did not arise in the Daniels Case; but it does arise in actions at common law and under some other statutes in order to decide whether there has been negligence. Even then the question is not whether "the consequence is a reasonable and probable one," but whether harm to someone of the same general kind as that sustained by the plaintiff was a reasonable and probable result of the act complained of, as bearing upon the ultimate question whether there was negligence on the part of the defendant. Negligence may be found even though the particular result of the act may not have been susceptible of being foreseen. See *Ogden v. Aspinwall*, 220 Mass. 100, 107 N. E. 448, and cases there collected; *Larson v. Boston Elev. R. Co.* 212 Mass. 262, 98 N. E. 1048; *Wiemert v. Boston Elev. R. Co.* 216 Mass. 598, 104 N. E. 360; *Brightman's Case*, 220 Mass. 17, ante, 321, 107 N. E. 527, 8 N. C. C. A. 102.

Other instances where liability is not predicated upon negligence, and where therefore there is no occasion to consider in any aspect natural and probable consequences, are actions to recover damages arising from fires set by locomotive engines (*Bowen v. Boston & A. R. Co.* 179 Mass. 524, 61 N. E. 141); from a vicious animal knowingly kept (*Marble v. Ross*, 124 Mass. 44); from dogs (*Pressey v. Wirth*, 3 Allen, 191); or from the breaking away of impounded waters (*Rylands v. Fletcher*, L. R. 3 H. L. L.R.A.1916A.

330, 37 L. J. Exch. N. S. 161, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235). So far as concerns conduct of defendants, liability follows absolutely in such cases when the particular decisive fact is shown to exist.

The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen "out of and in the course of" the employment. Part 2, § 1. It is of no significance whether the precise physical harm was the natural and probable, or the abnormal and inconceivable, consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death "results from the injury." Part 2, § 6. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of, and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death. *Dunham v. Clare* [1902] 2 K. B. 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645; *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622. See also *Southall v. Cheshire County News Co.* 5 B. W. C. C. 251; *Malone v. Cayzer* [1908] S. C. 479, 1 B. W. C. C. 27, 45 Scot. L. R. 351. In deciding whether the chain of causation between the injury and the death is broken by the intervention of some independent agency, the rule of *Daniels v. New York, N. H. & H. R. Co.* 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424, is to be followed under the workmen's compensation act as well as in other cases to which the rule is applicable. There is no difference between the rule laid down in the Daniels Case and that in the English cases just cited. But this error in law did not affect the result reached by the Industrial Accident Board. The decision of the Board rests upon the rule of the Daniels Case, and hence need not be disturbed.

What has been said disposes of all the requests for rulings presented by the insurer. It does not appear that the Board misdirected itself in any matter of law material to its decision on the facts found.

Decree affirmed.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

CAROLINE MILLIKEN

v.

TRAVELERS' INSURANCE COMPANY,  
Appt.

(216 Mass. 293, 103 N. E. 898.)

**Master and servant — workmen's compensation act — injury due to lapse of memory.**

Pneumonia contracted by an employee who, because of prior injuries, suffers a lapse of memory while in charge of his master's team, and, in attempting to get the horses to the stable, loses his way, wanders from the wagon into a swamp, and suffers exposure during the night, is not an injury "arising out of" his employment, within the meaning of a workmen's compensation act

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(January 8, 1914.)

**A**PPEAL by the insurance company from a decree of the Superior Court for Suffolk County, awarding compensation to the dependent plaintiff under the workmen's compensation act, for the death of her husband, in accordance with a decision of the Industrial Accident Board. Reversed.

The facts are stated in the opinion.

Messrs. **Walter I. Badger, William Harold Hitchcock, and Louis C. Doyle**, for appellant:

Milliken did not suffer a personal injury within the meaning of the workmen's compensation act.

*Coe v. Fife Coal Co.* [1909] S. C. 393, 46 Scot. L. R. 328, 2 B. W. C. C. 8; *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275; *Fenton v. J. Thorley & Co.* [1903] A. C. 445, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684.

Where the proximate cause of the condition complained of is disease, there can be no recovery under a policy insuring against bodily injuries, even though it is plain that the disease was accidentally acquired.

*Clark v. Employers' Liability Assur. Co.* 72 Vt. 458, 48 Atl. 639; *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; *Binder v.*

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to applicability of compensation acts where insane workman commits suicide or suffers personal injuries, see annotation, post, 339.

L.R.A.1916A.

*National Masonic Acci. Asso.* 127 Iowa, 25, 102 N. W. 190; *Ætna L. Ins. Co. v. Dorney*, 68 Ohio St. 151, 67 N. E. 254; *Sharpe v. Commercial Travelers' Mut. Acci. Asso.* 139 Ind. 92, 37 N. E. 353; *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423.

The death of Milliken did not arise out of his employment.

*Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; *Fitzgerald v. Clarke* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *Amy v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117; *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. 824, 5 B. W. C. C. 355; *Rodger v. Paisley School Bd.* [1912] S. C. 584, 49 Scot. L. R. 413, 5 B. W. C. C. 547.

Milliken's exposure and consequent death did not occur in the course of his employment.

*McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038.

**Mr. W. H. Sullivan** for appellee.

**Loring, J.**, delivered the opinion of the court:

This is an appeal from a decree of the superior court, based on a decision of the Industrial Accident Board, ordering the insurer to pay \$1,950 for the death of Frank T. Milliken. The facts found by the board were these:

Milliken, at the time of his death in October, 1912, and for some twenty-seven years before that time, had been a driver in the employ of A. Towle & Company, the insured, who were teamsters. Some four or five years before his death Milliken, in the course of his employment, fell from his wagon, striking on his head. This caused, inter alia, an impairment of memory. One afternoon in July, 1912 (three months before his death), Milliken lost his memory while driving his employer's wagon in Boston, and for half an hour was unable to remember where he was or to identify the streets in which he was driving, although they were streets with which he was "thoroughly familiar." During the day of October 8, 1912, from a similar failure of memory Milliken did not call for packages, as his duties required, and reported (contrary to the fact) that he had not received them because they were not ready. There-



upon he was directed to drive his wagon to his employer's stable in Charlestown to be put up for the night. Driving his wagon to the stable for the night was part of Milliken's regular work. This order was given to Milliken about 5 o'clock in the afternoon at his employer's Boston office in Matthews street, near Postoffice square. "At some place between Postoffice square and the stable in Charlestown he was seized with such a loss of memory and mental faculties that he was unable to recognize streets and places, and on account of such disordered mental condition he became lost and unable to direct the horse to the stable." About 11 o'clock that night Milliken was seen driving the wagon in a private way in Burlington and was helped back to the public highway, whereupon he drove away in the direction of Lowell. At this time Milliken would not speak. At about 6 o'clock the following morning Milliken was found lying in a swamp in Woburn and—with the exception of his head—covered with mud and water. His hat was found on the "adjacent road" some 200 feet away, and the horse and wagon were found "by the side of said road, about half a mile distant, in the direction of Boston." Milliken was taken to a hospital at Woburn, where he died on October 14th, without recovering his memory. He "spoke in a delirium only of looking for his horse." The cause of his death was pneumonia, brought on by cold and exposure while lying in the swamp.

The Industrial Accident Board found: "That the loss of memory with which the employee, Milliken, was seized, was not in itself a fatal disorder, and that he would not have met his death as he did but for the horse and wagon and his effort to get them to the stable."

The dependent's contention is that Milliken's death was caused by pneumonia brought on by his falling into the swamp and lying there all night; that, under these circumstances, falling into the swamp and lying there all night was a personal injury which caused his death; and for this she relies on *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 1 Scot. L. T. 167, 6 B. W. C. C. 398, 4 N. C. C. A. 899, and *Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 4 B. W. C. C. 417, 48 Scot. L. R. 768.

The fact that Milliken "would not have met his death as he did but for the horse and wagon and his effort to get them to the stable" goes no farther than to show that the personal injury suffered by Milliken was a personal injury "in the course of his employment."

The difficulty in the case arises from the provision that the personal injury must be L.R.A.1916A.

one "arising out of" as well as one "in the course of his employment."

It was held in *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522, that the provision limiting the personal injuries for which compensation is to be made to those "arising out of" the employee's employment means that the nature and conditions of the employment must be such that the personal injury which in fact happened was one likely to happen to an employee in that employment. In that case it was said that there must be a "causal connection" between the employment and the injury.

There is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. The distinction between the case at bar and a case within this clause of the act is well brought out by what is suggested by a remark of the majority of the Industrial Accident Board. If the horse driven by Milliken had run away, and Milliken had been thereby thrown out and killed, the personal injury in fact suffered in that case would have been one which, from the nature of his employment, would be likely to arise, and so would be one "arising out of his [the employee's] employment." But, as we have said, there is nothing in the employment of driving a wagon which makes it likely that the employee will alight from his wagon, wander to and fall into a swamp, and lie there all night. *Sneddon v. Greenfield Coal & Brick Co.* [1910] S. C. 362, 3 B. W. C. C. 557, 47 Scot. L. R. 337, much relied on here by the dependent, is another case which brings out the distinction. There a miner got lost in the underground ways of a mine and was killed by the exhaust steam from an engine which was not fenced off. See also *Wicks v. Dowell & Co.* [1905] 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732.

We find nothing in the other cases relied on by the dependent which calls for notice.

It seems plain that if Milliken's death was caused by a personal injury, it was the one which happened some four or five years before the occurrence here complained of, and before the workmen's compensation act was passed. At that time he fell from his wagon, and, striking on his head, suffered as a result "an impairment of his memory."

The decree of the Superior Court appealed from is reversed, and a decree should be entered declaring that the dependent has no claim against the insurer.

So ordered.

**Annotation—Applicability of compensation act where insane workman commits suicide or suffers personal injuries.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

The decisions in *RE SPONATSKI* and *MILLIKEN v. TRAVELERS' INS. Co.*, although differing upon the ultimate question of awarding compensation, are not conflicting in principle. In the former case the insanity of the workman was found to have been caused by the injury which he had received, and consequently his self-inflicted death was properly considered as the proximate result of the injury. In *MILLIKEN v. TRAVELERS' INS. Co.*, however, the mental derangement from which the workman suffered was in no way connected with his employment. There was no chain of causation whatever.

The Scotch court of sessions has also held that death from suicide committed while the workman was insane as a result of the injury may be found to be due to accident. *Malone v. Cayzer* [1908] S.

C. 479, 45 Scot. L. R. 351, 1 B. W. C. C. 27.

But insanity cannot be inferred merely from the fact that a workman who had received an injury to his eye, and was suffering great pain, committed suicide, although there was no other reason advanced for the act except the injury. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 84 L. J. K. B. N. S. 847, 8 B. W. C. C. 69 [1915] W. N. 43, 59 Sol. Jo. 233 [1915] W. C. & Ins. Rep. 250, 112 L. T. N. S. 840.

And it is error for the county court judge to find that a workman committed suicide while insane as a result of an injury, where the workman's body was found in a canal, and there was no evidence to show how he came to be in the canal, and there had been no symptoms of a suicidal tendency, although he had become depressed and irritable and restless as a result of the injury. *Southall v. Cheshire County News Co.* (1912) 5 B. W. C. C. (Eng.) 251. W. M. G.

**WISCONSIN SUPREME COURT.**

HELENA HOENIG, Appt.,  
v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Respts.

(159 Wis. 646, 150 N. W. 996.)

**Master and servant — workmen's compensation act — death by lightning — liability.**

Death by lightning while an employee is upon a dam, performing the duties of his employment, is not within a statute providing compensation in case of death from injury proximately caused by accident while the employee was performing services growing out of and incident to his employment, where the Industrial Commission has found upon substantial evidence that there was no hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunderstorm.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

(February 9, 1915.)

**Note.**—As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to liability under workmen's compensation acts for death or injuries of employee by lightning, see annotation, post, 347. L.R.A.1916A.

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Dane County, affirming an order of the defendant Commission, dismissing plaintiff's application for compensation from the defendant company for the death of her husband. Affirmed.

Statement by **Kerwin, J.:**

This is an appeal from a judgment affirming the findings and order of the respondent Industrial Commission of Wisconsin, dismissing the application of the appellant for compensation from the respondent Lindauer-O'Connell Company by reason of the death of her husband, John Hoenig. John Hoenig was employed by the respondent Lindauer-O'Connell Company, and while so employed, and on August 8, 1913, was struck by lightning and killed. The question involved is whether the order of the Industrial Commission should be disturbed.

**Mr. Albert H. Krugmeier**, for appellant:

The defendant company was liable under the compensation act for an injury caused by lightning to its employee in the course of his employment, irrespective of whether the industry combined with the elements in producing the injury.

1 Bradbury, *Workmen's Compensation*, 2d ed. pp. 335-338; *Mundt v. Sheboygan & F. du L. R. Co.* 31 Wis. 451; *Smith v. Chicago*,



M. & St. P. R. Co. 124 Wis. 120, 102 N. W. 336; Hoffmann v. Milwaukee Electric R. & Light Co. 127 Wis. 76, 106 N. W. 808; International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

Messrs. **W. C. Owen**, Attorney General, and **Winfield W. Gilman**, Assistant Attorney General, for respondent Commission:

If Hoenig's death was purely accidental, and not connected with his employment, applicant is not entitled to compensation.

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Milwaukee v. Miller, 154 Wis. 652, ante, 1, 144 N. W. 188, 4 N. C. C. A. 149, Ann. Cas. 1915B, 847; State ex rel. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 137 Wis. 80, 117 N. W. 846; Minneapolis, St. P. & S. Ste. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119, 3 N. C. C. A. 707, Ann. Cas. 1914D, 655; Rayner v. Sligh Furniture Co. 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851; McNicol's Case, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; Milliken's Case, 216 Mass. 293, ante, 337, 103 N. E. 898, 4 N. C. C. A. 512; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Terleeki v. Strauss, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584.

Hoenig was not, at the time and place of injury, exposed to a hazard from lightning stroke peculiar to the industry, or substantially differing from the hazard from lightning stroke of any out-of-door work.

Kelly v. Kerry County Council, 42 Ir. Law Times, 23, 1 B. W. C. C. 194; Karemaker v. The Corsican, 4 B. W. C. C. 295; Warner v. Couchman [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 4 B. W. C. C. 32, 55 Sol. Jo. 107; Blakey v. Robson, E. & Co. 5 B. W. C. C. 536, 49 Scot. L. R. 254, [1912] W. C. Rep. 86, [1912] S. C. 334; Rodger v. Paisley School Board, 5 B. W. C. C. 547, 49 Scot. L. R. 413, [1912] W. C. Rep. 157, [1912] S. C. 584; Craske v. Wigan, 101 L. T. N. S. 6, 2 B. W. C. C. 35, [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 25 Times L. R. 632, 53 Sol. Jo. 560.

The finding of the Industrial Commission that Hoenig was not exposed to a hazard from lightning stroke peculiar to the industry, or substantially differing from the hazard of lightning stroke of any ordinary out-of-door work, is final and conclusive.

Davies v. Gillespie, 5 B. W. C. C. 64, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11; Morgan v. The Zenaida, 2 B. W. C. C. 19, 25 Times L. R. 446; Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. L.R.A.1916A.

1915B, 877; International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

Messrs. **Brown, Pradt, & Genrich**, for respondent company:

The word "accident" is susceptible of different meanings; so that the meaning to be given to it as used in the compensation act is to be determined from the context and the general scope and purpose of the act.

Ullman v. Chicago & N. W. R. Co. 112 Wis. 163, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; Dawbarn, Employers' Liability, p. 99; People v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 251; Church of the Holy Trinity v. United States, 143 U. S. 457, 461, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Wisconsin Industrial School v. Clark County, 103 Wis. 651, 79 N. W. 422; Borgnis v. Falk Co. 147 Wis. 377, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State v. Clark, 29 N. J. L. 96; Neacy v. Milwaukee County, 144 Wis. 217, 128 N. W. 1063; Rice v. Ashland County, 108 Wis. 189, 84 N. W. 189.

An industrial accident is "something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it."

Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

The findings of the Commission are conclusive.

Nekoosa-Edwards Paper Co. v. Industrial Commission, 154 Wis. 105, post, 348, 141 N. W. 1013, Ann. Cas. 1915B, 995.

**Kerwin, J.**, delivered the opinion of the court:

The court below, in affirming the findings of the Industrial Commission, held that the workmen's compensation act "limits compensation to those cases in which the accident grows out of the hazards of industrial enterprises and is peculiar to such enterprises," and further held that "an injured employee is entitled to compensation when the industry combines with the elements in producing an injury by a lightning stroke," and further found that it could not be said that there was not a substantial basis for the finding in the evidence taken before the Commission. We are inclined to agree with the learned court below in its conclusions and judgment in the case.

It is insisted by counsel for appellant that there is no basis for the findings of the Commission. The Commission found that the deceased, John Hoenig, was in the employ of the respondent the Lindauer-O'Connell Company, and while performing services growing out of and incidental to his employment, at work on a dam on the Fox river in Wisconsin, received a stroke of lightning, which re-

sulted in his death; that, at the time and place when and where said Hoenig came to his death, it had been raining, and the rain was accompanied by thunder and lightning; that at said time and place deceased was not exposed to a hazard from lightning stroke peculiar to the industry, or differing substantially from hazard from lightning stroke of an ordinary outdoor work; that the death of Hoenig was not proximately caused by accident, within the meaning of chapter 599, Laws of 1913.

It is first insisted by counsel for appellant that under the Wisconsin compensation act liability exists for an injury caused by lightning to an employee in the course of his employment, irrespective of whether the industry combines with the elements in producing the injury, on the ground that the statute expressly gives compensation where three facts exist namely: (1) That the employer and employee are under the act; (2) that the employee was performing services growing out of and incidental to his employment; and (3) that the injury was proximately caused by accident, not intentionally self-inflicted.

The contention of appellant is that the statute is plain, and that there is no room for construction; that, where the three facts named exist, compensation follows, as matter of right, under the act. The act should be construed in the light of the history of its passage. Pursuant to chapter 518, Laws of 1909, a committee was appointed which investigated and presented a report to the legislature of 1911. This report tends to show the construction placed upon the act by the committee, and that it was not intended to include other than industrial accidents or "hazards incident to the business." Minneapolis, St. P. & S. Ste. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119, 3 N. C. C. A. 707, Ann. Cas. 1914D, 655.

It seems quite clear that the injuries for which compensation is to be paid, under the act, are such as are incidental to and grow out of the employment. *Ibid.*; Milwaukee v. Miller, 154 Wis. 652, ante, 1, 144 N. W. 188, 4 N. C. C. A. 149, Ann. Cas. 1915B, 847; Rayner v. Sligh Furniture Co. 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851; McNicol's Case, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Kelly v. Kerry County Council, 42 Ir. Law Times, 23, 1 B. W. C. C. 194.

The question, therefore, arises whether the injuries received by Hoenig were incidental to and grew out of the employment. This proposition turns upon the nature of the hazard to which deceased was exposed at the time and place of injury. Was he ex-

posed to a hazard from lightning stroke peculiar to the industry? The Industrial Commission held that he was not, and that the exposure to hazard from lightning stroke at the time and place of injury was not different, substantially, from that of the ordinary out-of-door work. The court below affirmed the findings of the Industrial Commission. True, the court in its findings said that, if the case were presented to it for a finding from the evidence, it would not make the finding which was made by the Commission, and further found that a careful review of the evidence led the court to conclude that it could not say that there was not substantial basis for the finding of the Commission in the evidence taken before it.

It is well settled both on principle and authority that the findings of the Commission should not be disturbed where there is any substantial basis for them in the evidence. *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822; *Milwaukee Western Fuel Co. v. Industrial Commission*, 159 Wis. 635, 150 N. W. 998; *Nekoosa-Edwards Paper Co. v. Industrial Commission*, 154 Wis. 105, post, 348, 141 N. W. 1013, Ann. Cas. 1915B, 995; Stat. 1913, § 2394-19.

Counsel for appellant appears to rely with confidence upon *Andrew v. Failsworth Industrial Soc.* 90 L. T. N. S. 611, [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429. An examination of that case, however, will show that it differs quite materially in its facts from the instant case. There the position of the injured person, as shown by the evidence, was much more hazardous because of the employment than ordinarily. Moreover, in that case the finding of the county judge, awarding compensation, was affirmed.

In the case now before us there was substantial basis in the evidence for the finding of the Commission to the effect that there was no hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunderstorm accompanied by rain.

The Commission in its opinion said: "There was testimony in this case of an expert nature for the purpose of showing that the employment of deceased at the water's edge was peculiarly dangerous from exposure to lightning. This evidence does not convince the Commission to a moral certainty that the employment was extrahazardous in this regard. It is admitted that the action of lightning is extremely freakish; and, while it is more or less controlled by general



law, there are so many different elements entering into its control that we do not think the evidence in this case established that the deceased was in any position of exceptional danger because of the possibilities of lightning stroke."

Section 2394-19, Stat. 1913, provides: "The findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive; . . . the same shall

be set aside only upon the following grounds: (1) That the board acted without or in excess of its powers. (2) That the award was procured by fraud. (3) That the findings of fact by the board do not support the award."

Upon the record in this case we are convinced that the judgment of the court below must be affirmed.

## MICHIGAN SUPREME COURT.

KATHERINE KLAWINSKI

v.

LAKE SHORE & MICHIGAN SOUTHERN  
RAILWAY COMPANY.

(— Mich. —, 152 N. W. 213.)

### Master and servant — death by lightning — workmen's compensation act.

Death by lightning of a section hand on a railroad, while in a barn to which he had resorted while in the ordinary performance of his duty, by direction of his foreman, for refuge from a storm, does not arise out of and in the course of his employment, within the meaning of a workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(April 19, 1915.)

**C**ERTIORARI to the Industrial Accident Board to review its decision affirming an award by a committee of arbitration of compensation under the workmen's compensation act for the death of claimant's husband. Reversed.

The facts are stated in the opinion.

Messrs. **Angell, Boynton, McMillan, Bodman, & Turner**, for respondent:

The death of Frank Klawinski, for which compensation is now asked by his widow, did not result from "a personal injury arising out of and in the course of his employment," within the meaning of the workmen's compensation law, and she is not entitled to compensation.

*Kelly v. Kerry County Council*, 42 Ir. Law Times, 23, 1 B. W. C. C. 194; *Warner v. Couchman* [1912] A. C. 35, 105 L. T. N. S. 676, 81 L. J. K. B. N. S. 45, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177; *Karemaker v. The Corsican*, 4 B. W. C. C. 295; *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R.

**Note.**—As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to liability under workmen's compensation acts for death or injuries of employee by lightning, see annotation, post, 347. L.R.A.1916A.

267, 57 Sol. Jo. 300, 6 B. W. C. C. 190; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, 2 B. W. C. C. 35; *McNicol's Case*, 215 Mass. 497, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Amys v. Barton* [1912] 1 K. B. 40, [1911] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117.

**Mr. W. Glenn Cowell**, for claimant:

The death of claimant's decedent was caused by "a personal injury arising out of and in the course of his employment," within the meaning of the workmen's compensation law, which entitles her to compensation.

*McNiece v. Singer Sewing Mach. Co.* [1911] S. C. 13, 48 Scot. L. R. 15, 4 B. W. C. C. 351; *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 27 Times L. R. 299, 55 Sol. Jo. 363, 104 L. T. N. S. 473, 4 B. W. C. C. 242; *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; *Chitty v. Nelson*, 126 L. T. Jo. 172, 2 B. W. C. C. 496; *McLauchlan v. Anderson* [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376, *Taylor v. Jones*, 123 L. T. Jo. 553, 1 B. W. C. C. 3; *Morris v. Lambeth*, 22 Times L. R. 22; *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 So. 96; *Jarvis v. Hitch*, — Ind. App. —, 65 N. E. 608; *Boyd, Workmen's Compensation*, § 480.

**McAlvay, J.**, delivered the opinion of the court:

In its return to a writ of certiorari in this cause the Industrial Accident Board certifies as follows: "That at the time of the injury for which compensation was sought herein, to wit, on the 15th day of May, 1913, respondent had accepted to become subject to the terms of act No. 10, Public Acts of Special Session of 1912, commonly known as the 'workmen's compensation law.' That on the 28th day of July, 1913, said Katherine Klawinski made application to the board of arbitration of a claim to compensation from respondent for the death of her husband, Frank Klawinski, on the 15th day

of May, 1913, while in its employ. That a committee of arbitration was duly formed which, after hearing the parties, made an award that respondent pay to said applicant the sum of \$5.24 per week for a period of 300 weeks. That thereafter an appeal was taken by respondent from such award to said Board on the ground that deceased did not receive an injury arising out of and in the course of his employment. That on the 20th day of November, 1913, an order was made by said Board, affirming the award of said committee. The facts involved in this cause appear in the agreed statement hereto attached. The Board does certify that said statement of facts is correct."

The following is the stipulation adopted by respondent Board as its finding of facts in the case:

State of Michigan—Before the Industrial Accident Board.

Katherine Klawinski, Applicant, v. Lake Shore & Michigan Southern Railway Company, Respondent.

It is thereby stipulated and agreed between the parties hereto by their respective attorneys, that the facts out of which controversy in the above-entitled cause arises, and which it is desired may be made a part of the return to the writ of certiorari heretofore issued from the supreme court in this cause to said Industrial Accident Board, are as follows: Frank Klawinski, applicant's husband, was employed prior to and on the 15th day of May, 1913, by respondent as a section laborer. On said date he was working as a member of a section gang of six men on respondent's roadway near Bronson, Michigan. During the afternoon of that day a violent wind and rain storm arose. The foreman of the gang said, "Boys, we better get out of the storm." There was a barn near by, where the section gang had been in the habit of taking refuge from storms. The assistant foreman said, "Come and go into the barn." The foreman directed one of the men, named Kolassa, to go for the coats, and waited for him. While he did so, the rest of the gang, including Klawinski, went to the barn, the foreman and Kolassa going to a near-by tenant house. While in the barn, and during said storm, Klawinski was killed by a bolt of lightning. During the time the men were in the barn no work was performed. At such time as they had previously gone in this barn for shelter, the men had been paid for their time and were so paid on this occasion. The assistant foreman was subject to the authority of the foreman, and had charge of the men during his absence. It was in the presence of the foreman that he said, "Come and go into the barn."

L.R.A.1916A.

The only contention in the case made by appellant is that the death of Frank Klawinski for which compensation is asked by and was granted to his widow, did not result from "a personal injury arising out of and in the course of his employment," and within the meaning of the workmen's compensation law, and therefore the Industrial Accident Board erred in affirming the award of the committee of arbitration. The proposition is fundamental that a claimant is entitled only to an award of compensation for "a personal injury arising out of and in the course of his employment." To determine whether the injury in the instant case is within the meaning of the law, and arose "out of and in the course of his employment," we must consider the nature and character of that employment. Decedent was employed at the time as a section laborer, one of a section gang of six men, working upon defendant's roadway at the usual and ordinary work performed by railroad sectionmen, in which it may be said, as a general proposition, there is no use of or work performed in connection with electrical machinery or appliances, nor any unusual proximity to such machinery or appliances. There is no doubt that it was the legislative intent to compensate workmen for injuries resulting from industrial accidents, and that such compensation is charged against the industry because it is responsible for the injury.

As far as the instant case is concerned the scope of the English statute may be considered identical with the Michigan workmen's compensation law. Several cases have been passed upon by the English courts arising under the English law where compensation was sought for injury by lightning, and, except in cases where the employment necessarily placed the employee at the time of his injury in a position subjecting him to unusual risk from lightning, compensation has been denied.

In a case identical with the instant case, where a workman employed as a road laborer, picking stones and clearing out gutters along a highway, during a thunderstorm was killed by lightning, the court held that the accident causing death did not arise out of the workman's employment. The court said: "I am unable to find any special or peculiar danger from lightning to which these men [deceased and his companions] were exposed from working on the road. No expert or other evidence was offered to me that their presence on the road involved any greater danger of being struck by lightning than if they had been working in a field or garden or a factory. The antecedent probability that they would be struck by lightning was no greater in their case than it was in the case of any



other person who was within the region over which the thunderstorm passed." *Kelly v. Kerry County Council*, 42 Ir. Law Times, 23, 1 B. W. C. C. 194.

This question has been before the Industrial Commission of Wisconsin in the case of *Lindauer O'Connell Co. v. Hoenig*, where the widow of John Hoenig, who came to his death by a stroke of lightning while he was employed by the company at work on a dam in the Fox river, taking planks out of the water above the dam, filed a claim for compensation on account of his death. Among other things, the Commission found as a fact that "at the time and place of the injury to John Hoenig resulting in his death, deceased was not exposed to a hazard from lightning stroke peculiar to the injury [industry], or substantially differing from the hazard from lightning of any other out-of-door work," and, further, that his death "was not proximately caused by any accident within the meaning of the term as used in chapter 599, Laws of Wisconsin 1913." In a memorandum opinion filed in the case, the Commission, among other things, said: "Lightning stroke is not popularly spoken of as an accident where it comes from the action of the elements without the agency of man. When the agency [industry] through the agency of man combines with the elements and produces injury to the employee by lightning stroke, it may well be said that the injury grows out of the employment and is accidental. Such has been the decision of the English courts under the English compensation act. We are aware that the language of the English act differs from the language of our act, but if we accept the construction of the legislative committee which drew the act, then we find the meaning of the two acts in this respect identical. Clearly the industry may be and ought to be charged with the burden resulting from the hazards of the industry itself. . . . We have no desire to pass on the question of public policy. That function is wholly within the province of the legislature. We merely desire to correctly interpret the legislative intent. The legislative committee in its report says that 'compensation shall be paid when the injury grows out of the employee's employment,—it makes no difference who is to blame; it is sufficient that the industry caused the injury.' So, in the case of lightning stroke, if we can find as a fact that the injury grew out of the employment, or that the industry caused the injury, then undoubtedly compensation should be paid. Assuming the law to provide compensation for industrial accidents only,—those growing out of the employment and L.R.A.1916A.

caused by the industry,—we must approach the consideration of each case of injury by lightning on the question of fact. Did the injury grow out of the employment, and did the industry cause the injury? The act provides for compensation for 'personal injuries accidentally sustained, . . . where the injury is proximately caused by accident.' We are of the opinion that this language refers to industrial accidents,—those caused by the industry and chargeable to the industry,—and does not apply to injuries resulting from those forces of nature described in the common law as acts of God, such forces as are wholly uncontrolled by men."

The prayer for compensation was denied, and the case dismissed.

Our quotations from the foregoing opinion are made from a certified copy which was furnished the court by counsel for appellant, who stated that they were unable to find that the opinions of the Industrial Commission of Wisconsin were officially published.

It is our opinion that in the instant case claimant's husband did not come to his death as the result of "a personal injury arising out of and in the course of his employment," within the meaning of the workmen's compensation law. It is clear from the stipulated facts that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that plaintiff's decedent by reason of his employment was in no way exposed to injuries from lightning other than the community generally in that locality.

Under the stipulated facts in the case the Industrial Accident Board was in error in affirming the award of the committee of arbitration, and its decision and determination are hereby reversed and set aside.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. PEOPLE'S COAL & ICE COMPANY, Plff. in Certiorari,

v.

DISTRICT COURT OF RAMSEY COUNTY et al.

(129 Minn. 502, 153 N. W. 119.)

**Master and servant — workmen's compensation — death by lightning.**

A driver for an ice company was required to follow a fixed route in substantial dis-

Headnote by DIBELL, C.

Note.—As to application and effect of

regard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rain storm, accompanied by lightning, was in progress, he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. It is held that the evidence sustains a finding that the death of the decedent was the result of an accident "arising out of" his employment, within the meaning of the workmen's compensation act (Laws 1913, chap. 467, § 9; Gen. Stat. 1913, § 8203).

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(June 4, 1915.)

**C**ERTIORARI to the District Court for Ramsey County to review a judgment confirming an award under the workmen's compensation act for the death of Sebastian Meier. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Barrows, Stewart, & Ordway, for plaintiff in certiorari:

Risks resulting from other sources unconnected with the employment are not borne by the employer.

Fitzgerald v. W. G. Clarke & Son [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101.

Death from lightning did not rise "out of" his employment.

Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; Kelly v. Kerry County Council, 42 Ir. Law Times, 23, 1 B. W. C. C. 194; Warner v. Couchman [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51; Karemaker v. The Corsican, 4 B. W. C. C. 295; Blakey v. Robson, E. & Co. [1912] S. C. 334, 5 B. W. C. C. 536, 49 Scot. L. R. 254, [1912] W. C. Rep. 86; Rodger v. Paisley School Board [1912] S. C. 584, 5 B. W. C. C. 547, 49 Scot. L. R. 413, [1912] W. C. Rep. 157; Amys v. Barton [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; McNicol's Case, 215 Mass. 197, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522.

The mere fact that an employee was properly in a certain place during his employment, and received injury in that place, is not alone sufficient.

workmen's compensation acts generally, see annotation, ante, 23.

As to liability under workmen's compensation acts for death or injuries of employee by lightning, see annotation, post, 347.

L.R.A.1916A.

ment, and received injury in that place, is not alone sufficient.

Craske v. Wigan, 2 B. W. C. C. 35, 101 L. T. N. S. 6, [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 25 Times L. R. 632, 53 Sol. Jo. 560; Hoenig v. Industrial Commission, 159 Wis. 646, ante, 339, 150 N. W. 996, 8 N. C. C. A. 192.

Messrs. Durment, Moore, & Oppenheimer and Frank C. Hodgson, for defendant in certiorari:

The question whether an accident arises out of the employment is a question of fact for the trial court.

Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; Kelly v. Kerry County Council, 42 Ir. Law Times, 23, 1 B. W. C. C. 194; Johnson v. The Torrington, 3 B. W. C. C. 68; Clover, C. & Co. v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; Davies v. Gillespie, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Rayner v. Sligh Furniture Co. 180 Mich. 168, ante, 22, 146 N. W. 665, 4 N. C. C. A. 851; International Harvester Co. v. Industrial Commission, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822; Brightman's Case, 220 Mass. 17, ante, 321, 107 N. E. 527, 8 N. C. C. A. 102.

It is not necessary as a matter of law for the claimant to prove that the employment was the proximate cause of the accident in the sense in which it is necessary to prove proximate cause in the case of a tort or a crime.

Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 21 Times L. R. 486, 7 W. C. C. 23, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330; Rowland v. Wright, 24 Times L. R. 852, 77 L. J. K. B. N. S. 1071; Morgan v. The Zenaida, 25 Times L. R. 446, 2 B. W. C. C. 19; Nisbet v. Rayne & Burn, 3 B. W. C. C. 507, [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719; Anderson v. Balfour, 3 B. W. C. C. 588, [1910] 2 I. R. 497, 44 Ir. Law Times, 168; Moore v. Manchester Liners [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527; Davies v. Gillespie, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11; Kelly v. Trim Joint Dist. School [1913] W. C. & Ins. Rep. 401, 47 Ir. Law Times, 151, affirmed in House of Lords [1914] W. C. & Ins. Rep. 359, [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 7 B. W. C. C. 274, 111 L. T. N. S. 305, [1914] W. N. 177, 30 Times L. R. 452; Martin v. J. Lovibond



& Sons [1914] W. C. & Ins. Rep. 78, [1914] 2 K. B. 227, 83 L. J. K. B. N. S. 806, 7 B. W. C. C. 243, 110 L. T. N. S. 455, [1914] W. N. 47; *Zabriskie v. Erie R. Co.* 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778; *Terlecki v. Strauss & Co.* 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584; *Brightman's Case*, 220 Mass. 17, ante, 321, 107 N. E. 527, 8 N. C. C. A. 102.

The courts have uniformly construed the words "out of employment" liberally and with a view to extending the scope of a remedial statute.

*State ex rel. Virginia & R. Lake Co. v. District Ct.* 128 Minn. 211, 150 N. W. 211, 7 N. C. C. A. 1076.

Dibell, C., filed the following opinion:

Certiorari to the district court of Ramsey county to review its judgment adjudging that Caroline Newmann was entitled to compensation under the workmen's compensation act for the death of her son.

The deceased was employed by relator as a driver on one of its ice routes. He drove an open wagon and his duties required him to work in all kinds of weather. It was permissible to seek shelter from storms in such way as one might; but the necessity of prompt daily deliveries required the drivers to complete their routes in substantial disregard of weather conditions.

On the morning of September 1, 1914, during a severe rain storm, accompanied by lightning, the deceased was on his usual route. He left his team in the street and went towards a large elm tree standing just within the lot line, either for protection from the storm, or his way to solicit orders. There was an iron fence along the lot. Just as he reached the iron fence lightning struck the tree and struck him, and he was killed, his body falling upon the fence. It may be mentioned, though little importance is attached to it, that he carried a steel pick in a holster on his left hip in accordance with the usual custom. He had been working all morning in the storm, using an uncovered wagon, and subject to the elements.

The workmen's compensation act, so far as here material, requires compensation to be paid by the employer "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, . . ." *Laws* 1913, p. 677, chap. 467, § 9 (*Gen. Stat.* 1913, § 8203).

In *State ex rel. Duluth Brewing & Malt-ing Co. v. District Ct.* 129 Minn. 176, 151 N. W. 912, we adverted to the distinction drawn by the courts between the statutory phrases "arising out of" and "in the course of." We did not then deem it wise to at-L.R.A.1916A.

tempt the making of a definition accurately distinguishing the two phrases; and the case before us does not call for such distinction. We leave ourselves free to determine the meaning of the compensation act, and the constructions which should be given its various provisions as litigation presents them. Counsel concede that the only question is whether the death of the decedent was from an accident arising out of his employment, it being conceded that his death by lightning was an accident. They base their arguments chiefly upon cases involving injury or death by lightning, supplemented by cases illustrating the principles thought to underly them.

If the deceased was exposed to injury from lightning by reason of his employment, something more than the normal risk to which all are subject, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one "arising out of employment." An injury, to come within the compensation act, need not be an anticipated one; nor, in general, need it be one peculiar to the particular employment in which he is engaged at the time.

Only three cases involving deaths from lightning are cited,—an English, and Irish, and an American case. Since the submission of the case another American case, *Klawinski v. Lake Shore, & M. S. R. Co.* — *Mich.* —, ante, 342, 152 N. W. 213, has been decided.

In *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 90 L. T. N. S. 611, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 *Week. Rep.* 451, 20 *Times L. R.* 429, a leading case, a bricklayer was killed by lightning, while working on a scaffold some 23 feet from the ground. His position, under the evidence adduced, subjected him to peculiar danger and risk from lightning. A finding that his death arose out of his employment was sustained.

In *Kelly v. Kerry County Council*, 42 *Ir. Law Times*, 23, 1 B. W. C. C. 194, it was held that one killed by lightning while working on a public road did not come to his death from an accident "arising out of his employment." The court distinguished the facts of the case from those present in the *Andrew Case* just cited, holding that there was present no peculiar risk or danger incident to the employee's work so that it could be said that the accident arose from his employment. No evidence was offered of a peculiar risk or hazard from lightning incident to his employment.

The English case and the Irish case are not regarded as inconsistent. In the *Scotch*

case of *Rodger v. Paisley School Board* [1912] S. C. 584, the court, in commenting upon them, tersely states the distinction in this way: "To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment."

In *Hoenig v. Industrial Commission*, 159 Wis. 646, ante, 339, 150 N. W. 996, 8 N. C. C. A. 192, an employee was struck and killed by lightning while working on a dam. The Industrial Commission held that his death did not arise out of his employment. The circuit court affirmed its holding, saying, however, that upon the same evidence it would not make a like finding, and its holding was sustained by the supreme court. By the Wisconsin statute the findings of the Commission are final upon questions of fact; and by § 30 [p. 688] of the Minnesota act the review by the supreme court in compensation cases is by certiorari, and it is a review of questions of law, and not of questions of fact.

The Michigan case, *Klawinski v. Lake Shore & M. S. R. Co.* supra, involved the death of a railway section hand killed by lightning when in a barn near the right of way, to which he had gone for protection from a storm. The court cites the Irish case, *Kelly v. Kerry County Council*, supra,

which it considers controlling. It cites no other case, but refers to the holding of the Wisconsin Industrial Commission, affirmed in *Hoenig v. Industrial Commission*, supra. The man was exposed to no peculiar danger by the character of his work. The court, in referring to cases under the English law, said that compensation had always been denied for injury by lightning, "except in cases where the employment necessarily placed the employee at the time of his injury in a position subjecting him to unusual risk from lightning."

The opinion of the court was that "decident, by reason of his employment, was in no way exposed to injuries by lightning other than the community generally in that locality."

Many other cases, useful in arriving at a conclusion, are cited in the very helpful briefs of opposing counsel, and in the carefully considered memorandum of the trial court. We do not stop to review them. They are the subject of editorial consideration in the monographic notes of the different series of selected cases and in the legal journals of the period, and are easily accessible to the profession. See 1 *Bradbury, Workmen's Compensation, Act*, 398-518.

We are of the opinion that the evidence is sufficient to sustain a finding that the accident to the decedent resulting in his death was one "arising out of" his employment.

Judgment affirmed.

### Annotation—Compensation for injury by lightning.

The foregoing decisions in *HOENIG v. INDUSTRIAL COMMISSION*, *KLAWINSKI v. LAKE SHORE & M. S. R. Co.*, and *STATE EX REL. PEOPLE'S COAL & ICE CO. v. DISTRICT CT.*, together with *Kelly v. Kerry County Council* (1908) 42 Ir. Law Times, 23, 1 B. W. C. C. 194, and *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. (Eng.) 32, 90 L. T. N. S. 611, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429 (both of which are sufficiently set out in the foregoing opinions), are the only cases which have passed upon this interesting question.

The printed decisions leave little to be said upon the subject.

It may be noted that the English, Irish, Wisconsin, and Minnesota courts approved the findings of the arbitrator or Commission passing upon the facts, the English and Minnesota courts sustaining an award of compensation, and the Irish and Wisconsin courts sustaining the finding that no compensation was recoverable, although it is to be noticed that the L.R.A.1916A.

Wisconsin court stated that the court below in its findings had said that if the case were presented to it for a finding from the evidence, it would not make the finding which was made by the Commission.

On the other hand, the Michigan court reversed the award of compensation made by the Commission, apparently taking the view that the question was not one of fact, but that, as a matter of law, a workman injured by lightning does not suffer injury arising out of and in the course of his employment. Possibly the court did not intend to take this position, but the language used would seem to indicate it.

The language of the appellate division of the supreme court of New York in *Moore v. Lehigh Valley R. Co.* (1915) 169 App. Div. 177, 154 N. Y. Supp. 620, supports the conclusions reached by the Minnesota court, and is in direct conflict with the decision in the Michigan case. The workman in this case was a lineman, and sought shelter during a storm under



cars standing upon a switch near by his place of work. It was not the custom of the defendant to furnish shelter for its linemen in the event of sudden storms, and there was no rule of the defendant as to what the men were to do in such contingency, but each man was supposed to find shelter wherever he could. The defendant was not accustomed to make any deductions in the wages of its linemen by reason of sudden storms interfering with the work, and the defendant made no such deductions upon this occasion. Claimant and several of the other workmen stood under a tree until it no longer furnished protection, when some of the men went into a paper mill near by and, there being no more room there, and apparently no other available shelter, the claimant and two other workmen found shelter under the cars standing on a switch, and while there the cars were moved by an engine belonging to another railroad company, and the claimant was injured. In affirming an award of compensation for the injuries thus received, the court said: "That the injury was sustained by claimant during the course, that is, the period or time or extent, of employment is not seriously disputed by the defendant; but the defendant strenuously contends that the injury did not arise out of the employment. That the injuries occurred during the working hours, which were continuous; that it was customary for the defendant's linemen to cease work and obtain shelter during sudden storms, and that no deduction was made

from the ordinary daily wages paid the workmen by reason thereof, is conceded. It was not only customary that the claimant should seek shelter from the storm, but doing so was not a remote, but a necessary and unquestionably frequent incident of his employment during the summer months. Had he taken shelter in the paper mill, and the roof fallen in, or the floor given way and he had been accidentally injured, he would have been entitled to the benefit of the workmen's compensation law. Whether a place in a stone crusher being operated by machinery, or under a car standing upon a switch, was the safer place, does not appear. The four linemen chose places under the cars. However, assuming that the place under the car was the more dangerous, the fact that the plaintiff's judgment led him to choose it, and that he was injured there, does not bar him from the operation of the act. Contributory negligence furnishes no grounds of defense. . . . The act of seeking and obtaining shelter arose out of, that is, within the scope or sphere of his employment, and was a necessary adjunct and an incident to his engaging in and continuing such employment. . . . Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over was not only necessary to the preservation of the claimant's health and perhaps his life, but was incident to the claimant's work, and was an act promoting the business of the master."

W. M. G.

#### WISCONSIN SUPREME COURT.

NEKOOSA-EDWARDS PAPER COMPANY,  
Respt.,  
v.

INDUSTRIAL COMMISSION OF WISCONSIN  
et al., Appts.

(154 Wis. 105, 141 N. W. 1013.)

#### Master and servant — workmen's compensation act — injury due to intoxication — liability.

1. That injury to an employee was proximately caused by his voluntary intoxication does not relieve the employer from liability therefor under a statute making him liable

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to liability for compensation where injured workman was intoxicated at the time of the injury, see annotation, post, 351. L.R.A.1916A.

for injury proximately caused by accident, and not by wilful misconduct.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — finding by Commission — conclusiveness.

2. A finding by the Commission under the workmen's compensation act that, although an injury to an employee was due to his intoxication, it was not caused by his wilful misconduct so as to relieve the employer from liability under the statute, cannot be disturbed by the court where it has no authority to review the evidence.

*For other cases, see Courts, I. c, in Dig. 1-52 N. S.*

(Marshall, Barnes, and Vinje, JJ., dissent.)

(May 31, 1913.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Dane County in plaintiff's favor in a proceeding to re-

view an award of the Industrial Commission for death of one of plaintiff's employees. Reversed.

The facts are stated in the opinion.

Messrs. **W. C. Owen**, Attorney General, and **Byron H. Stebbins**, Assistant Attorney General, for appellants:

The expression "wilful misconduct" had, prior to the enactment of the compensation act, acquired a fixed meaning in Wisconsin law.

That meaning excludes any degree of negligence, and includes only wanton, intentional acts or conduct,—those in which there is "intent actual or constructive, to injure."

*Rideout v. Winnebago Traction Co.* 123 Wis. 297, 69 L.R.A. 601, 101 N. W. 672, 17 Am. Neg. Rep. 400; *Astin v. Chicago, M. & St. P. R. Co.* 143 Wis. 477, 31 L.R.A. (N.S.) 158, 128 N. W. 265; *Fox v. Chicago, St. P. M. & O. R. Co.* 147 Wis. 310, 133 N. W. 19; *Watermelen v. Fox River Electric R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *McClellan v. Chippewa Valley Electric R. Co.* 110 Wis. 326, 85 N. W. 1018; *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, 9 Am. Neg. Rep. 209; *Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808, 13 Am. Neg. Rep. 631; *Haverlund v. Chicago, St. P. M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273; *Com. v. Kneeland*, 20 Pick. 206; *Potter v. United States*, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *Huff v. Chicago, I. & I. R. Co.* 24 Ind. App. 492, 79 Am. St. Rep. 274, 56 N. E. 932; *State v. McAloon*, 142 Wis. 72, 124 N. W. 1067; *State v. Preston*, 34 Wis. 675; *Brown v. State*, 137 Wis. 543, 119 N. W. 338; *Krom v. Antigo Gas Co.* 154 Wis. 528, 140 N. W. 41; *Cohn v. Neeves*, 40 Wis. 393; *Schumacher v. Falter*, 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber*, 117 Wis. 58, 93 N. W. 826; *Smith v. Cutler*, 10 Wend. 589, 25 Am. Dec. 580; *Citizens' Ins. Co. v. Marsh*, 41 Pa. 386.

The term "wilful misconduct" is used in the compensation act with the meaning it had previously acquired in Wisconsin law.

*Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41; *Ketchum v. Chicago, St. P. M. & O. R. Co.* 150 Wis. 211, 136 N. W. 634.

Intoxication proximately causing an injury is not "wilful misconduct," as a matter of law.

*Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303, 97 Wis. 523, 73 N. W. 41; *Ward L.R.A.* 1916A.

*v. Chicago, St. P. M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, 9 Am. Neg. Rep. 209; *Gould v. Merrill R. & Lighting Co.* 139 Wis. 433, 121 N. W. 161.

Smith's intoxication did not constitute "wilful misconduct."

*Wilson v. Chippewa Valley Electric R. Co.* 120 Wis. 636, 66 L.R.A. 912, 98 N. W. 536; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174.

Mr. **W. E. Wheelan**, also for appellants.

Messrs. **Brown, Pradt, & Genrich**, for respondent:

Intoxication is misconduct.

17 Am. & Eng. Enc. Law, 403, 404; *State v. Kraemer*, 49 La. Ann. 774, 62 Am. St. Rep. 664, 22 So. 254.

The misconduct was wilful.

*Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 73; *Brown v. State*, 137 Wis. 543, 119 N. W. 338; *State v. Smith*, 52 Wis. 136, 8 N. W. 870; *Cincinnati, T. St. L. & N. R. Co. v. Cooper*, 120 Ind. 469, 6 L.R.A. 241, 16 Am. St. Rep. 336, 22 N. E. 340, 3 Am. Neg. Cas. 251; *Boyd, Workmen's Compensation*, § 468; *Bradley v. Salt Union*, 9 W. C. C. 32, 122 L. T. Jo. 302; *McGroarty v. John Brown Co.* 43 Scot. L. R. 598.

**Timlin, J.**, delivered the opinion of the court:

On January 23, 1913, the Industrial Commission made an award directing that the respondent pay to Mittie Smith the sum of \$2,040 on account of the death of her husband, Pat Smith, while in the employment of respondent. March 24, 1913, in an action brought for that purpose, the circuit court for Dane county set aside this award on the ground that the Industrial Commission acted in excess of its powers in finding that the death of Pat Smith was not caused by wilful misconduct. The finding of the Commission on this point was as follows: "The death of Pat Smith was proximately caused by accident, and was not caused by wilful misconduct; that at the time of such accident Pat Smith was in an intoxicated condition which proximately caused the accident."

The statute, § 2394—4, provides that "liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: . . . (3) Where the injury is proximately caused by accident, and is not so caused by wilful mis-



conduct." Section 2394—19: "The findings of fact made by the Board acting within its powers shall, in the absence of fraud, be conclusive; . . . the same shall be set aside only upon the following grounds: (1) That the Board acted without or in excess of its powers. (2) That the award was procured by fraud. (3) That the findings of fact by the Board do not support the award."

It is quite possible for a person to be in an intoxicated condition which condition proximately caused the accident which proximately caused the death, and yet not be guilty of wilful misconduct. The drinking of intoxicating liquor is wilful in the sense of intentional, but the mere fact of drinking is not misconduct. By § 1561, Stat., any person found in any public place in such a state of intoxication as to disturb others, or unable by reason of his condition to care for his own safety or for the safety of others, is guilty of a misdemeanor. This is misconduct, and if one intentionally put himself in this condition he might be said to be guilty of wilful misconduct. But there are many cases where, although the drinking is intentional, the intoxication is not, as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition, becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him. While intoxication in such case to the degree specified might be a misdemeanor under the statute quoted, it is not necessarily wilful misconduct within the compensation act. The intoxication might under such circumstances be the proximate cause of an accident resulting in injury or death, and yet not have reached that degree specified in this statute, as in case where it produced mere drowsiness.

There was evidence in the instant case that deceased was slightly intoxicated, that he drove out of the clay pit standing upon his load, that he was perfectly able to take care of himself and drive his team when last seen alive. There was, therefore, room to find upon the evidence not only with respect to the degree of intoxication, but that there was no intention or purpose to put himself in a dangerous or helpless condition of intoxication. The Industrial Commission has jurisdiction to pass on these very questions, and their finding above referred to does determine these questions. It finds that Smith was in an intoxicated condition which proximately caused the accident, but that the accident was not caused by wilful misconduct. This means that he did not wilfully bring upon himself such degree of intoxication.

If we were authorized to review the evidence L.R.A.1916A.

dence we might come to a different conclusion. But the statute is mandatory that the award shall not be set aside on such ground. The Industrial Board has jurisdiction to decide whether or not the intoxication which caused the death or injury was wilful, consequently it did not act in excess of its powers in deciding the negative in the instant case. There is no claim that the award was procured by fraud, and the findings of fact support the award. Hence, without reaching the interesting questions put forward in the briefs of counsel, we reverse the judgment of the circuit court and direct that the award of the Industrial Commission be affirmed.

Judgment reversed, and the cause remanded to the Circuit Court with directions to affirm the award of the Industrial Commission.

**Barnes, J., dissenting:**

The plain unvarnished tale in this case is that Smith, an habitual toper, left his work, went to a saloon some distance from his place of employment, got a partial "jag" on, started back with a bottle of whisky, and got so drunk that thereafter, while he was driving his team over a smooth road, he fell off the wagon and broke his neck. There is no suggestion that the whisky was injected into him by force or by stealth or artifice. He bought it himself and drank it alone. It was an offense under the law of Wisconsin for him to get so drunk that he could not provide for his own safety or the safety of others, for which he might have been punished had he survived. Of course, if the act of drinking was accidental or automatic, or a mere mechanical exercise unconsciously performed, then intent would be lacking. But there is neither finding nor evidence that such was the fact. The deceased was a seasoned veteran, having a penchant for getting drunk, who from his long experience must have known and appreciated his capacity. The Commission did not find that the deceased got drunk by accident. There was no evidence in the case to warrant any such finding. It did not award damages on any such theory. It plainly says so in its decision. After holding that the claimant was drunk at the time he fell off the wagon, and that the drunkenness caused his death, it says: "The question we have to decide is whether or not such intoxication is a defense against compensation." And in conclusion the Commission says: "If the legislature had so intended, we believe that it would have specifically so provided in the act." The court holds that if the claimant got drunk intentionally, that would be wilful misconduct within the meaning of the statute. The Commission held that it would

not be, as I read the findings and decision. It is apparent that if the Commission construed the law as does the court, it would have denied recovery. This court sustains the conclusion reached by the Commission in a curious manner. It in effect says that the Commission found that there was no wilful misconduct. Under some circumstances drunkenness would not be wilful misconduct. Ergo the Commission must have found that the exculpating circumstances existed, and its finding in this behalf is conclusive on the court.

It was not found that the deceased got drunk on an unusually small allowance of liquor because of sickness, hunger, or any other reason. Such a finding would totally lack support in the evidence. Where a party accustomed to the use of liquor drinks it until he gets drunk, the presumption is that he intended to do just what he did do. It was for the claimant to show by some

facts or circumstances that for some reason or other the deceased drank less liquor than was ordinarily necessary to produce stupefaction in the instant case. No such evidence was produced. I think the circuit court was clearly right in holding that there could be no recovery, and that the Commission would have reached the same conclusion had it construed the law as the circuit court did and as this court does. The judgment of the court is based on a finding of fact which the Commission did not make, to wit, that the deceased did not intend to get drunk. What the Commission in reality concluded was that intention was immaterial because an allowance might be made for an injury resulting from intentional intoxication.

Marshall and Vinje, JJ., concur in the foregoing opinion of Barnes, J.

### Annotation—Recovery of compensation where injured workman was intoxicated at the time of the injury.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

There appears to be no American decision other than NEKOOSA-EDWARDS PAPER CO. v. INDUSTRIAL COMMISSION which passes upon the question whether or not compensation is recoverable where the injured workman was intoxicated at the time of his injury.

In some early decisions under the English act it has been held that intoxication is "serious and wilful misconduct." *Burrell v. Avis* (1898; C. C.) 106 L. T. Jo. (Eng.) 61, 1 W. C. C. 129; *M'Groarty v. Brown* (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 809.

Under the English act of 1906 "serious and wilful misconduct" does not prevent a recovery of compensation if the injury results in death or in serious permanent disablement; but, even under this act, the question still remains whether or not an injury received by a workman while he is intoxicated arises "out of and in the course of" his employment.

In the following cases, under the circumstances indicated, no recovery was allowed, upon the ground that the injuries did not arise out of the employment: *M'Crae v. Renfrew* (1914) 2 Scot. L. T. 354, 51 Scot. L. R. 467 [1914] S. C. 539, 7 B. W. C. C. 898 (a commercial traveler went to a town, but made no attempt to transact business, and became intoxicated, and was injured at the station while awaiting the train home); *Murphy v. L.R.A.* 1916A.

*Cooney* [1914] 2 I. R. 76 [1914] W. C. & Ins. Rep. 44, 48 Ir. Law Times, 13, 7 B. W. C. C. 962 (mate on a vessel injured while in a place from which he had been ordered by the master); *Horsfall v. The Jura* [1913] W. C. & Ins. Rep. (Eng.) 183, 6 B. W. C. C. 213 (second mate of vessel did not obey order of captain to go to his room, but went to another part of the vessel); *Frith v. The Louisiana* [1912] 2 K. B. (Eng.) 155, 81 L. J. K. B. N. S. 701 [1912] W. C. Rep. 285, 5 B. W. C. C. 410, 106 L. T. N. S. 667 [1912] W. N. 98, 28 Times L. R. 331 (sailor who had been on shore on leave returned to vessel in state of hopeless intoxication); *Nash v. The Rangatira* [1914] 3 K. B. (Eng.) 978, 83 L. J. K. B. N. S. 1496 [1914] W. N. 291, 111 L. T. N. S. 704, 58 Sol. Jo. 705, 7 B. W. C. C. 590 (sailor returned to ship in drunken condition, and, in going up gangway from quay to the ship, let go his hold on hand rope and fell onto the quay).

In *O'Brien v. Star Line* (1908) 45 Scot. L. R. 935, 1 B. W. C. C. 177, a seaman returned to his ship late at night, the worse for liquor, and was found the next morning lying in the bottom of a hold. There was no evidence as to how he came there, and it was held that it could not be said that he was injured by accident arising "out of and in the course of" the employment.

In two recent cases, however, it has been held that where a workman has been injured by doing the precise work that



he was employed to do, he may recover the ladder because of his intoxicated compensation for such injuries, although condition); *Frazer v. Riddell* [1914] S. C. 125, 2 *Scot. L. T.* 377, 51 *Scot. L. R.* 110, he was intoxicated at the time of the in- [1914] W. C. & Ins. Rep. 125, 7 B. W. C. jury. *Williams v. Llandudno Coaching & Carriage Co.* (1915) 31 *Times L. R. C.* 841 (engine driver on traction engine (Eng.) 186, 84 L. J. K. B. N. S. 655 fell off foot plate and was fatally in- [1915] W. C. & Ins. Rep. 91 [1915] W. jured; compensation allowed although N. 52, 59 *Sol. Jo.* 286 [1915] 2 K. B. 101, driver was under influence of drink, and 112 L. T. N. S. 848, 8 B. W. C. C. 143 unfit for work at the time).

W. M. G.

## MICHIGAN SUPREME COURT.

JESSIE B. CLEM

v.

CHALMERS MOTOR COMPANY, Plff. in  
Certiorari.

(178 Mich. 340, 144 N. W. 848.)

### Master and servant — employers' liability act — descent from roof by rope — wilful misconduct.

A carpenter who is injured by attempting to descend from the roof of a building on which he is working by means of a loose rope, one end of which is held in the hands of a fellow workman, instead of by the ladder provided for such purpose, is within the protection of the employers' liability act providing for compensation to an employee who receives injuries arising out of and in the course of his employment, and not within the exception of injuries received by his intentional and wilful misconduct.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(McAlvay, Ch. J., dissents.)

(January 5, 1914.)

**C**ERTIORARI to review an order of the Industrial Accident Board affirming an award of an arbitration committee allowing the claim of plaintiff under the employers' liability act for injuries to her husband resulting in death. Affirmed.

The facts are stated in the opinion.

Messrs. **Bowen, Douglas, Eaman, & Barbour**, for plaintiff in certiorari:

Clem did not receive a personal injury arising out of and in the course of his employment.

*Boyd, Workmen's Compensation*, § 472; *Losh v. Richard Evans & Co.* 51 *Week. Rep.* 243, 19 *Times L. R.* 142; *Lowe v. Pearson* [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 79 L. T. N. S. 654, 47 *Week. Rep.* 193, 15 *Times L. R.* 124; *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 68 L. J. Q.

**Note.** — As to what constitutes "serious and wilful misconduct" within the meaning of the compensation act, see annotation following this case, post, 355.  
L.R.A.1916A.

B. N. S. 51, 47 *Week. Rep.* 146, 79 L. T. N. S. 633, 15 *Times L. R.* 64; *Hendry v. United Collieries* [1910] S. C. 709, 47 *Scot. L. R.* 635, 3 B. W. C. C. 567; *Callaghan v. Maxwell*, 2 *Sc. Sess. Cas.* 5th Series, 420, 37 *Scot. L. R.* 313, 7 *Scot. L. T.* 339; *Williams v. Wigan Coal & Iron Co.* 3 B. W. C. C. 65; *Barnes v. Nunnery Colliery Co.* [1912] A. C. 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 *Times L. R.* 135, 56 *Sol. Jo.* 159, 49 *Scot. L. R.* 688, 5 B. W. C. C. 195; *Reed v. Great Western R. Co.* [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 25 *Times L. R.* 36, 99 L. T. N. S. 781, 53 *Sol. Jo.* 31; *Martin v. John Fullerton & Co.* [1908] S. C. 1030, 45 *Scot. L. R.* 812; *Haley v. United Collieries* [1907] S. C. 214; *Morrison v. Clyde Navigation* [1909] S. C. 59, 46 *Scot. L. R.* 40; *Ruegg, Employers' Liability & Workman's Compensation*, 8th ed. p. 340.

Clem was injured by reason of his intentional and wilful misconduct.

*Low v. General Steam Fishing Co.* [1909] S. C. 63, 46 *Scot. L. R.* 55; *Roberts v. People*, 19 *Mich.* 401; 40 *Cyc.* 938; *Benfield v. Vacuum Oil Co.* 75 *Hun.* 209, 27 *N. Y. Supp.* 16; *De Young v. Irving*, 5 *App. Div.* 499, 38 *N. Y. Supp.* 1089; *Baldwin, Personal Injury*, 2d ed. § 358; *Morgan v. Hudson River Ore & Iron Co.* 133 *N. Y.* 666, 31 *N. E.* 234; *Secombe v. Detroit Electric R. Co.* 133 *Mich.* 170, 94 *N. W.* 747; *Niles v. New York C. & H. R. R. Co.* 14 *App. Div.* 70, 43 *N. Y. Supp.* 751, 1 *Am. Neg. Rep.* 511; *Bist v. London & S. W. R. Co.* [1907] A. C. 209, 76 L. J. K. B. N. S. 703, 96 L. T. N. S. 750, 23 *Times L. R.* 471, 8 *Ann. Cas.* 1; *Glasgow Coal Co. v. Sneddon*, 7 *Sc. Sess. Cas.* 5th Series, 485; *Condron v. Paul*, 6 *Sc. Sess. Cas.* 5th Series, 29, 41 *Scot. L. R.* 33, 11 *Scot. L. T.* 383.

Messrs. **Shields & Shields**, for defendant in certiorari:

Clem was not injured by reason of his intentional and wilful misconduct.

*Com. v. Perrier*, 3 *Phila.* 229; *Decker v. McSorley*, 116 *Wis.* 643, 93 *N. W.* 808, 13 *Am. Neg. Rep.* 631; *Lawlor v. People*, 74 *Ill.* 228.

Mrs. Clem is entitled to compensation irrespective of whether or not her husband was injured by reason of his intentional and wilful misconduct.

Boyd, Workmen's Compensation, § 577, subdiv. C, p. 1136.

Moore, J., delivered the opinion of the court:

This is certiorari directed to the Industrial Accident Board of the state to review an order allowing the claim of Jessie B. Clem, widow of Charles S. Clem, deceased, for the sum of \$3,000 against the contestant. The claim is made under the employers' liability act, so called, being act No. 10 of the Public Acts of the Special Session of 1912.

Charles S. Clem sustained injuries by falling while descending from the roof of a building in the course of construction by means of a rope. It is conceded if there is any liability that the compensation of \$3,000 is a correct sum to be paid. Following the death of Mr. Clem, an arbitration was had before an arbitration committee, which allowed the claim. An appeal was taken to the Industrial Accident Board, which Board affirmed the award of the arbitration committee.

The record shows Mr. Clem had worked for some weeks as a carpenter for the Chalmers Motor Company. On the day of the accident he was assisting in placing roof boards upon a building which was 150 feet wide, 160 feet long, and 19 or 20 feet high from the ground to the eaves. It was a flat roof. Between 9 and 10 o'clock the men were instructed by a subforeman to come down from the top of the building for a coffee lunch, so called. The men went to and from the roof in the course of the work by means of a ladder which was attached firmly to the side of the building, extending from the ground to the roof. There were on the roof of the building some loose ropes. These were used for the purpose of raising and lowering material. They were not provided for men to go up and down. On the call being made to come for the coffee, all of the men descended by the ladder but Mr. Clem and two fellow workmen named Sekos and Glaser. Instead of going down the ladder, Mr. Clem picked up one of the loose ropes about 20 feet long and gave one end of it to Sekos, directing him to hold it in his hand. The rope extended over the edge of the roof about 7 feet. Taking the rope in his hands, Mr. Clem passed over the edge of the roof and disappeared from the sight of the two men on the roof. If anyone saw what happened after that, it does not appear in the record further than L.R.A.1916A.

that Mr. Clem fell and was hurt, receiving injuries which resulted in his death.

The following appears in the record:

Mr. Kinnane: Now, is it contended that the act of coming down off the building to coffee lunch when they were called by the foreman for that cause was not in the due course of their employment? I am not speaking of the manner of doing it, but the fact of their coming down and going back.

Mr. Rogers: I concede that was a part of his employment.

Mr. Kinnane: Then it would simmer down to the manner of coming down, would it not?

A. Yes.

Mr. Kinnane: That would be the only matter at issue?

Mr. Rogers: Yes. My point on that matter as to that act: When the man was doing that act he was not in the course of his employment.

It is the claim of appellant (we quote from the brief): "(1) Charles S. Clem, the deceased, did not receive a personal injury arising out of and in the course of his employment. (2) He was injured by reason of his intentional and wilful misconduct."

The statute involved here is of such recent date that its construction has never been before this court. Statutes of a similar character are so recent that there is a paucity of decisions relating to them, especially in the American courts. Counsel cite a number of English and Scotch cases, but none of them are on all fours, nor is the principle of law stated in them controlling in the case before us.

The case now in this court is one of first impression. The title of act No. 10, Public Acts of Special Session of 1912, reads as follows: "An Act to Promote the Welfare of the People of This State, Relating to the Liability of Employers for Injuries or Death Sustained by Their Employees, Providing Compensation for the Accidental Injury to or Death of Employees, and Methods for the Payment of the Same, Establishing an Industrial Accident Board, Defining Its Powers, Providing for a Review of Its Awards, Making an Appropriation to Carry out the Provisions of This Act, and Restricting the Right to Compensation or Damages in Such Cases to Such as Are Provided by This Act."

We quote from the act:

"The people of the state of Michigan enact:

"Part 1. Modification of remedies.

"Section 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment,



or for death resulting from personal injuries so sustained, it shall not be a defense: (a) That the employee was negligent, unless and except it shall appear that such negligence was wilful; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in, or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

"Section 2. The provisions of § 1 shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

"Section 3. The provisions of § 1 shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employees of any employer who has elected, with the approval of the Industrial Accident Board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided

"Section 4. Any employer who has elected with the approval of the Industrial Accident Board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of § 1; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of, or personal injury to, any employee, for which death or injury compensation is recoverable under this act, except as to employees who have elected in the manner hereinafter provided not to become subject to the provisions of this act."

The appellant elected to come within the provisions of the act.

Sections 1 and 2, pt. 2, of the act, read in part as follows:

"Section 1. If an employee who has not given notice of his election not to be subject to the provisions of this act, as provided in part 1, § 8, or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined

"Section 2. If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

We have quoted sufficiently from the act to show that it is a very marked departure L.R.A.1916A.

from the old rule of liability on the part of the employer to the employee. It is clear that as to the employer who has accepted the provisions of the act, the risks of the employee arising out of and in the course of his employment are not assumed as heretofore by the employee, but must be compensated for according to the provisions of the act, unless the employee is injured by reason of his intentional and wilful misconduct.

The first question, then is: Did Mr. Clem receive a personal injury arising out of and in the course of his employment? And the second question is: Was he injured by reason of his intentional and wilful misconduct? The questions are so interwoven that they may well be discussed together. Mr. Clem, with others, was employed on a December day constructing a flat roof on a large building only 19 or 20 feet high. It would add not only to the comfort of these men, but to their efficiency as workers, to have them about 9 or 10 o'clock partake of a luncheon, which from the fact that hot coffee was served was called a coffee lunch. The luncheon was ordered by the foreman of the company. It was prepared on the premises, and when it was ready the men were directed by the subforeman to go and partake of it. All of them started to do so. They did not in doing so leave the premises of the appellant. All of them but three went down the ladder. Mr. Clem went down the rope, which projected over the eaves 7 feet. If he had kept hold of the rope until he reached the end of it, if he was a man of ordinary height and his arms were of the ordinary reach, his feet would be within 5 to 7 feet of the ground. If, when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof, or in company with the others had, in the attempt to reach the ladder, got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment? The getting his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of the roofing material. The injury, then, having arisen out of and in the course of his employment, can it be said that compensation should be defeated because of his intentional and wilful misconduct? His primary object was like that of all the other men to get to and partake of his luncheon. There is nothing to indicate that he intended or expected to be hurt. Nearly all the other

men went down by the ladder. He went down by a rope where, if his plans had carried, he would have had to make a drop of only 5 to 7 feet. Is that such intentional and wilful misconduct as to defeat compensation under the act? There is scarcely a healthy, wide-awake ten-year-old boy who does not frequently take a greater chance and without harm. For a man accustomed to physical toil, judged by what is occurring daily, it cannot be said that such an act should be characterized as intentional

and wilful misconduct within the meaning of the statute.

The allowance of the claim is affirmed.

Steere, Brooke, Stone, Kuhn, Ostrander, and Bird, JJ., concur.

McAlvay, Ch. J., dissenting:

I think that the cause of the injury to the deceased was his intentional wilful misconduct, and therefore cannot concur in this opinion.

### Annotation—What constitutes “serious and wilful misconduct” within the meaning of the compensation act.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

Under the English act the employer is not liable if the injury has been caused by the “serious and wilful misconduct” of the workman; similar provisions are found in the majority of the American statutes.

Under the New Jersey statute the employer is not exempted from liability for compensation because of the “wilful” negligence on the part of the workman; he is exempted from such liability only when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of the injury. *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915) — **N. J. L.** —, 95. *Atl.* 753; *Taylor v. Seabrook* (1915) — **N. J. L.** —, 94 *Atl.* 399.

“Wilful misconduct” means something more than mere negligence. *Great Western Power Co. v. Pillsbury* (1915) — **Cal.** —, 149 *Pac.* 35; *CLEM v. CHALMERS MOTOR CO.*

Or even gross negligence. *Burns' Case* (1914) 218 **Mass.** 8, 105 *N. E.* 601, 5 *N. C. C. A.* 635; *Nickerson's Case* (1914) 218 **Mass.** 158, 105 *N. E.* 604, 5 *N. C. C. A.* 645; *Gignac v. Studebaker Corp.* (1915) — **Mich.** —, 152 *N. W.* 1037.

The phrase involves conduct of a quasi criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with wanton and reckless disregard of its probable consequences. *Burns's Case* (**Mass.**) *supra*.

In *Wallace v. Glenboig Fire Clay Co.* [1907] **S. C.** (**Scot.**) 967, as cited in 2 *Mews' Dig.* (1898–07) *Supp.* 1547, it was held that the act must be wilful and also serious,—that is not doubtful or trivial in quality.

It has been said that misconduct is not “serious and wilful” unless moral *L.R.A.*1916A.

blame attaches to it. *Praties v. Broxburn Oil Co.* [1906–07] **S. C.** (**Scot.**) 581.

And that the word “serious” imports deliberateness, not merely thoughtlessness. *Johnson v. Marshall, Sons & Co.* [1906] **A. C.** (**Eng.**) 409, 75 *L. J. K. B.* *N. S.* 868, 94 *L. T. N. S.* 828, 22 *Times L. R.* 565, 8 *W. C. C.* 10, 5 *Ann. Cas.* 630.

The act itself must be serious, and not merely the consequences thereof as viewed after the happening. *Johnson v. Marshall, Sons & Co.* (**Eng.**) *supra*; *Hill v. Granby Consol. Mines* (1908) 12 **B. C.** 118; *Rees v. Powell Duffryn Steam Coal Co.* (1900) 64 *J. P.* (**Eng.**) 164 (miner injured while walking along a tram in a mine where he knew trams were approaching, but injury was caused by rope slipping, and there was no evidence that he could not have reached a manhole before the tram reached him); *Todd v. Caledonian R. Co.* (1899) 1 *Sc. Sess. Cas.* 5th Series, 1047, 36 **Scot. L. R.** 784, 7 **Scot. L. T.** 85; *Glasgow & S. W. R. Co. v. Laidlow* (1900) 2 *Sc. Sess. Cas.* 5th Series, 708, 37 **Scot. L. R.** 503, 7 **Scot. L. T.** 420. And see *CLEM v. CHALMERS MOTOR CO.*

The miner's injury must be held attributable to his own serious and wilful misconduct where he was injured in attempting to cross the rails in a mine while the hutes were running, and all injury could have been avoided by waiting until the hutes had ceased running. *Condron v. Paul* (1903) 6 *Sc. Sess. Cas.* 5th Series, 29, 41 **Scot. L. R.** 33, 11 **Scot. L. T.** 383.

The act of a farm servant who, in driving a lorry, ties the reins to a small wheel which works a brake on the front of the lorry, instead of keeping them in his hands, thereby causing the horse's head to be pulled around so as to make it run away and upset the lorry, amounts.



to serious and wilful misconduct. *Vaughan v. Nichol* (1906) 8 Sc. Sess. Cas. (**Scot.**) 5th Series, 464.

The mere fact that if a minor plaintiff had told the truth about his age he would not have been employed is not "serious and wilful misconduct" to which his injury in the course of that employment can be "attributed solely," under the British Columbia act. *Darnley v. Canadian P. R. Co.* (1908) 4 B. C. 15, 2 B. W. C. C. 505.

An employee was not negligent as a matter of law in going onto a wet and slippery walk to clear the debris from the rack protecting the flume leading water from the dam to the mill in which he was employed, where the work was necessary and all fairminded men would not believe that the risk of injury was so apparent that the ordinary prudent man would not have encountered it. *Boody v. K. & C. Mfg. Co.* ante, 10.

The phrase "serious neglect" as used in § 2, subsection C, of the British Columbia act does not refer to the conduct of the workman after the injury. *Powell v. Crow's Nest Pass Coal Co.* (1915) — B. C. —, 23 D. L. R. 57.

Refusal of an injured workman who was unable to speak or understand the English language, and was suffering great pain, to submit to a serious operation until fifteen or sixteen hours after it was first found necessary, does not amount to the intentional and wilful misconduct which will defeat the right to compensation. *Jendrus v. Detroit Steel Products Co.* post, 381.

Intoxication has been held to be serious and wilful misconduct under the English act. *Burrell v. Avis* (1898; C. C.) 106 L. T. Jo. (**Eng.**) 61, 1 W. C. C. 129; *M'Groarty v. John Brown & Co.* (1906) 8 Sc. Sess. Cas. (**Scot.**) 5th Series, 809.

Suicide has been spoken of as wilful misconduct. *Milwaukee Western Fuel Co. v. Industrial Commission* (1915) 159 Wis. 635, 150 N. W. 998.

A workman is not, as a matter of law, guilty of serious and wilful misconduct merely because he has violated rules and orders laid down by the master. *George v. Glasgow Coal Co.* [1909] A. C. (**Eng.**) 123, 78 L. J. P. C. N. S. 47, 99 L. T. N. S. 782, 25 Times L. R. 57, [1909] S. C. 1, 46 Scot. L. R. 28, 2 B. W. C. C. 125; *Rumboll v. Nunnery Colliery Co.* (1899) 80 L. T. N. S. (**Eng.**) 42, 63 J. P. 132; *Logue v. Fullerton* (1901) 3 L. R. A 1916A.

Se. Sess. Cas. 5th Series, 1006, 38 Scot. L. R. 738, 9 Scot. L. T. 152; *Reeks v. Kynoch* (1901) 18 Times L. R. (**Eng.**) 34, 50 Week. Rep. 130, 2 N. C. C. A. 877.

Serious and wilful misconduct does not include every violation of a rule or of express orders. *Great Western Power Co. v. Pillsbury* (1915) — Cal. —, 149 Pac. 35.

Of course, if the rule is unknown to the workman, or is habitually violated by the employee, then it cannot be said that the violation of such rule by the injured employee is, as a matter of law, serious and wilful misconduct. *McArthur v. McQueen* (1901) 3 Sc. Sess. Cas. 5th Series, 1010, 38 Scot. L. R. 732, 9 Scot. L. T. 114; *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353; *Casey v. Humphries* [1913] 6 B. W. C. C. 520, W. N. (**Eng.**) 221, 29 Times L. R. 647, 57 Sol. Jo. 716; *Johnson v. Marshall, Sons & Co.* [1906] A. C. (**Eng.**) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 8 W. C. C. 10, 5 Ann. Cas. 630.

It has also been held that ignorance of a rule for the guidance of miners may not amount to serious and wilful misconduct, although the miners had means of knowledge of the rule. *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353. But a decision apparently to the contrary has been handed down by the Scottish court of session in regard to a statutory rule. *Dobson v. United Collieries* (1905) 8 Sc. Sess. Cas. (**Scot.**) 5th Series, 241 (miner carrying cart-ridge not in case, with naked light in his cap).

The act of a painter in working around machinery while it was in motion, after he had been told not to, may be found not to be serious and wilful misconduct, where he was justified in believing that the machinery would stop at any moment. *Nickerson's Case* (1914) 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645.

But the breach of an express rule or order, particularly if made expressly for the safety of the employee, will generally be held to be serious or wilful misconduct as a matter of fact. *Callaghan v. Maxwell* (1900) 2 Sc. Sess. Cas. 5th Series, 420, 37 Scot. L. R. 313, 7 Scot. L. R. 339 (girl at work on threshing machine attempted to step across opening through which sheaves were fed to

the machine); *Dailly v. Watson* (1900) 2 Sc. Sess. Cas. 5th Series, 1044, 37 **Scot. L. R.** 782, 7 **Scot. L. T.** 73 (miner carrying naked lamp on cap while carrying cartridges not inclosed in a case); *United Collieries v. M'Ghie* (1904) 6 Sc. Sess. Cas. 5th Series, 808, 41 **Scot. L. R.** 705, 12 **Scot. L. T.** 650, and *Lynch v. Baird* (1904) 6 Sc. Sess. Cas. 5th Series, 271, 41 **Scot. L. R.** 214, 11 **Scot. L. T.** 597 (miners contravened special rule framed under the coal mines regulation act); *O'Hara v. Cadzow Coal Co.* (1903) 5 Sc. Sess. Cas. (**Scot.**) 5th Series, 439 (miner violated rule requiring erection of props at specified intervals); *John v. Albion Coal Co.* (1901) 18 **Times L. R.** (**Eng.**) 27, 65 **J. P.** 788 (miner failed to get into manhole in main haulage road of mine after warning of the approach of cars); *Guthrie v. Boase Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th Series, 769, 38 **Scot. L. R.** 483 (cleaning machinery in motion); *Bist v. London & S. W. R. Co.* [1907] **A. C.** (**Eng.**) 209, 76 **L. J. K. B. N. S.** 703, 96 **L. T. N. S.** 750, 23 **Times L. R.** 471, 8 **Ann. Cas.** 1; and *Jones v. London & S. W. R. Co.* (1901) 3 **W. C. C.** (**Eng.**) 46 (engine driver left foot plate of engine while in motion); *Brooker v. Warren* (1907) 23 **Times L. R.** (**Eng.**) 201 (workman failed to use guard to a saw); *Powell v. Lanarkshire Steel Co.* (1904) 6 Sc. Sess. Cas. (**Scot.**) 5th Series, 1039 (boy went into dangerous place); *Graniek v. British Columbia Sugar Ref. Co.* (1909) 14 **B. C.** 251 (use of freight elevator); *Watson v. Butterley Co.* (1902; **C. C.**) 114 **L. T. Jo.** (**Eng.**) 178, 5 **W. C. C.** 51 (breach of general rule in the mine); *Waddell v. Coltness Iron Co.* [1913] **W. C. & Ins. Rep.** 42, 52 **Scot. L. R.** 29, 6 **B. W. C. C.** 306 (miner did not wait prescribed time after lighting a fuse); *Rowe v. Reynolds* (1900) 12 **West Austr. L. R.** 75 (miner rode on truck of ore traveling about 6 miles an hour by gravitation); *Donnachie v. United Collieries* [1910] **S. C.** 503, 47 **Scot. L. R.** 412 (carelessness in using naked light in mine); *George v. Glasgow Coal Co.* [1909] **A. C.** (**Eng.**) 123, 78 **L. J. P. C. N. S.** 47, 99 **L. T. N. S.** 782, 25 **Times L. R.** 57, [1909] **S. C.** (**H. L.**) 1, 46 **Scot. L. R.** 28, 2 **B. W. C. C.** 125 (opening gate to shaft before cage was stopped); *Beall v. Fox* (1909; **C. C.**) 126 **L. T. Jo.** (**Eng.**) 257, 2 **B. W. C. C.** 467 (charwoman hanging out clothes stood on ledge of a glass frame).  
L.R.A.1916A.

In *Great Western Power Co. v. Pillsbury* (1915) — **Cal.** —, 149 **Pac.** 35, it was held that the failure of an experienced lineman to use rubber gloves while working around live wires, as the rule of the employer required, was serious and wilful misconduct, which was a bar to the recovery of compensation.

Where a workman does a dangerous act contrary to the express orders of his superior, and is injured, the accident is one intentionally produced within the meaning of the Quebec act. *Jette v. Grand Trunk Co.* (1911) **Rap. Jud. Quebec** 40 **C. S.** 204 (brakeman jumped off moving train).

Notwithstanding that the workman has been guilty of serious and wilful misconduct, such conduct on his part will not prevent a recovery unless it was the proximate cause of the injury. *Praties v. Broxburn Oil Co.* [1906] **S. C.** (**Scot.**) 581; *Allan v. v. Glenborg Union Fire Clay Co.* [1906] **S. C.** (**Scot.**) 967; *Glasgow Coal Co. v. Sneddon* (1905) 7 Sc. Sess. Cas. (**Scot.**) 5th Series, 485.

The burden of proving that the accident was due to the serious and wilful misconduct to the workman is upon the employer. *British Columbia Sugar Ref. Co. v. Graniek* (1910) 44 **Can. S. C.** 105, 2 **N. C. C. A.** 852.

Whether or not a workman is guilty of serious or wilful misconduct is a question of fact. *Johnson v. Marshall, Sons & Co.* [1906] **A. C.** (**Eng.**) 409, 75 **L. J. K. B. N. S.** 868, 94 **L. T. N. S.** 828, 22 **Times L. R.** 565, 8 **W. C. C.** 10, 5 **Ann. Cas.** 630; *Casey v. Humphries* [1913] 6 **B. W. C. C.** 520, **W. N.** (**Eng.**) 221, 29 **Times L. R.** 648, 57 **Sol. Jo.** 716; *Leishmann v. Dixon* [1910] **S. C.** 498, 47 **Scot. L. R.** 410, 3 **B. W. C. C.** 560; *Mitchell v. Whitton* [1906] **S. C.** (**Scot.**) 1267; *Nickerson's Case* (1914) 218 **Mass.** 158, 105 **N. E.** 604, 5 **N. C. C. A.** 645; *Nekoosa-Edwards Paper Co. v. Industrial Commission*, ante, 348.

The California supreme court, however, has held that, inasmuch as no compensation can be awarded to a workman whose injuries were caused by his own wilful misconduct, the question whether the accident was caused by the wilful misconduct of the employee is one which goes to the jurisdiction of the Industrial Board, and is therefore open to inquiry by the court on certiorari. *Great Western Power Co. v. Pillsbury* (1915) — **Cal.** —, 149 **Pac.** 35. W. M. G.



WASHINGTON SUPREME COURT.  
(Department No. 2.)

HORACE E. PEET, Appt.,  
v.  
E. M. MILLS, Resp't.

(76 Wash. 437, 136 Pac. 685.)

**Master and servant — workmen's compensation act — effect on employee's right of action against third person.**

1. Any right of action which an injured employee might otherwise have had for negligence, either against his employer or against a third person, must be considered as having been abolished by a workmen's compensation act which imposes upon the industries within its purview the burden arising out of injuries to their employees, and to that end withdraws all phases of the premises from private controversy, regardless of questions of fault, and to the exclusion of every other remedy, proceeding, and compensation, except as provided in the act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Statute — sufficiency of title.**

2. A title indicating that the act relates to the compensation of injured workmen is broad enough to include the abolition of negligence as a ground of recovery against third persons, since it indicates that the act is intended to furnish the only compensation to be allowed.

*For other cases, see Statutes, I. e, 2, in Dig. 1-52 N. S.*

(November 28, 1913.)

**A**PPPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Charles P. Spooner** and **George R. Biddle**, for appellant:

The right sought to be enforced here is one existing at common law, and without the aid of legislation, and a statute in derogation of such common-law rights should be strictly construed.

*Hays v. Miller*, 1 Wash. Terr. 143; *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252; *Seattle v. Fidelity Trust Co.* 22 Wash. 154, 60 Pac. 133; *State ex rel. Atty. Gen. v. Superior Ct.* 36 Wash. 381, 78 Pac. 1011.

The title of the act is not broad enough to permit the body of the act to contain

**Note.** — As to rights and remedies under compensation acts where injuries were caused by negligence of third person, see annotation following this case, post, 360. L.R.A.1916A.

such a provision as would abolish plaintiff's right of action.

*State v. Merchant*, 48 Wash. 69, 92 Pac. 890; *Blalock v. Condon*, 51 Wash. 608, 99 Pac. 733; *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791; *State v. Tie-man*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375; *State v. Poole*, 42 Wash. 192, 84 Pac. 727; *State ex rel. Matson v. Superior Ct.* 42 Wash. 491, 85 Pac. 264.

Messrs. **Kerr & McCord** and **J. N. Hamill**, for respondent:

A statute should always be construed with reference to its object, so that the intention of the legislature would be given effect.

*State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7; *State v. Stewart*, 52 Wash. 61, 100 Pac. 153, 17 Ann. Cas. 411; 36 Cyc. 1173.

When a new right is created by a statute which provides a method in which the right may be enforced, the method thus provided is the only one which can be pursued.

*Pollock v. Eastern R. Co.* 124 Mass. 158.

Where the parties are operating under the act, the injured employee, and his dependents in case of his death, are compelled to accept compensation from the insurance fund in the manner provided.

*State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602.

Messrs. **H. V. Tanner**, Attorney General and **S. H. Kelleran**, Assistant Attorney General, amici curiæ.

**Morris, J.**, delivered the opinion of the court:

By this appeal we are again called upon to review the workmen's compensation act of 1911 (Laws 1911, chap. 74, p. 345; 3 Rem. & Bal. Code, §§ 6604-1 et seq.) under appellant's contention that the act is applicable only where recovery is sought upon the ground of negligence of the employer. The facts upon which appellant predicates his right of action are these: On January 22, 1912, while in the employ of the Seattle, Renton, & Southern Railway Company as motorman, he was injured in a collision between two of the railway company's trains. Respondent was then the president of the railway company, and it is sought to hold him personally responsible for the injuries because of the allegations that, when he assumed the control and management of the railway company, it was equipped with a block signal system for use in foggy weather, which respondent negligently failed to operate; and that, when complaint was made by the train operators of the great danger of operating the trains

without the aid of the block signals, a promise was made by respondent to have the block signals working during foggy weather, which promise respondent failed to keep, and as a consequence of his negligence in so failing appellant was injured. The court below sustained a demurrer to the complaint, and, appellant electing to stand upon his complaint, the action was dismissed, and this appeal taken.

It is the contention of appellant, conceding he was at the time of his injury a "workman" within the meaning of the act, and that as such he has no right of action against the railway company, his employer, that the act in no way infringes upon his right of action against respondent, because:

(1) The act itself is in derogation of the common law, and, since it does not expressly abolish the doctrine of negligence as a ground of recovery except as against employers, it should be strictly construed; (2) even though it be admitted that the body of the act is in itself sufficient to abolish negligence as a ground of recovery of damages against all persons within the scope of the act, the title to the act is not broad enough to include such abolition as against anyone except employers. Our recent discussion of the workmen's compensation act of 1911, as found in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, and *State v. Mountain Timber Co.* 75 Wash. 581, L.R.A.—, —, 135 Pac. 645, renders unnecessary any further review of the act, except in so far as may be necessary to notice the contentions here raised. The act contains its own declaration of legislative policy, in reciting in § 1 that the common-law system in dealing with actions by employees against employers for injuries received in hazardous employments is inconsistent with the modern industrial conditions, uneconomic, unwise, and unfair, and that as the welfare of the state depends upon its industries, and even more upon the welfare of its workingmen, the state of Washington, in the exercise of its police and sovereign power, declares its policy to withdraw all phases of the premises from private controversy, regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as provided in the act, "and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes, are hereby abolished, except as in this act provided."

It is a well-accepted rule that remedial statutes, seeking the correction of recognized errors and abuses in introducing some L.R.A.1916A.

new regulation for the advancement of the public welfare, should be construed with regard to the former law and the defects or evils sought to be cured and the remedy provided; that in so construing such statutes they should be interpreted liberally, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted, even to the inclusion of cases within the reason, although outside the letter, of the statute (36 Cyc. 1173); and that in construing the statute courts will look to the old law, the mischief sought to be abolished, and the remedy proposed. *State v. Stewart*, 52 Wash. 61, 100 Pac. 153, 17 Ann. Cas. 411. Starting with these basic principles, the conclusion is evident that, in the enactment of this new law, the legislature declared it to be the policy of this state that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees; and that it was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law, and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the 1st section of the act. To say with appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystalized into law, that the industry itself was the primal cause of the injury, and, as such, should be made to bear its burdens. The employer and employee as distinctive producing causes are lost sight of in the greater vision, that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men, in so far as each is a proper charge against the cost of production. The legislature in this act was dealing, not so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought in the use of language it deemed apt to embody this principle into law. That in so doing the legislative mind



was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of § 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and "such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Referring again to § 1 of the act and the declaration of its exercise of police power by the state, to the end that it may advance the welfare of its citizens injured in any hazardous undertaking, we find this expression of intention: ". . . All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous work, and their families and dependents, is hereby provided regardless of questions of fault, and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes, are hereby abolished." *Laws 1911, p. 345, § 1 (3 Rem. & Bal. Code, § 6604-1)*. For these reasons we are of the

opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing, except as they are saved by the provisions of the act, are done away with.

Upon the second point we think there is no room for argument. The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry of the state, and the employment of the language further on in the title, "Abolishing the Doctrine of Negligence as a Ground for Recovery of Damages against Employers," is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained.

The second point is therefore overruled, and the judgment affirmed.

**Crow, Ch. J., and Mount, Parker, and Fullerton, JJ., concur.**

Petition for rehearing denied.

### **Annotation—Rights and remedies under compensation acts where injuries were caused by negligence of third person.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As is shown in *PEET v. MILLS*, the supreme court of Washington has held that the Washington act takes away any right of action that the injured employee may have had against the negligent third person whose negligence caused his injury.

But the Federal circuit court of appeals has subsequently held that an employee injured by the negligence of a third person has a right of action against such third person, although he has no right of action against his employer. *Meese v. Northern P. R. Co. (1914) 127 C. C. A. 622, 211 Fed. 254, 4 N. C. C. A. 819, reversing 206 Fed. 222*. The Federal court distinguished *PEET v. MILLS* upon the ground that the third person sought to be held liable for damages was in fact the president of the employer railroad, and consequently the plaintiff was attempting to hold another employee of the company liable. As will be shown by a reading of the opinion in *PEET v. L.R.A.1916A*.

*MILLS* nothing is made of this point by the Washington court, but the language is general and is in direct conflict with the decision of the Federal court.

In a decision by a lower New York court it was held that, notwithstanding § 11 of the New York act states that the liabilities prescribed by this statute shall be exclusive, the section refers solely to the liabilities of the employer, and does not prevent an injured employee from seeking redress in a common-law action against negligent third parties whose negligence caused the injury. *Lester v. Otis Elevator Co. 90 Misc. 649, 153 N. Y. Supp. 1058*.

Under the Wisconsin act a workman injured by the negligence of a third person may proceed against such third person for damages, notwithstanding both he and the workman's employer were under the provisions of the compensation act. *Smale v. Wrought Washer Mfg. Co. (1915) 160 Wis. 331, 151 N. W. 803*.

Under the New Jersey act, the workman, by duly releasing his employer

from compensation, does not release a tortfeasor whose negligence caused the accident. *Jacowicz v. Delaware, L. & W. R. Co.* (1915)—**N. J.** —, 92 Atl. 946.

Nor does a release of the tortfeasor release the employer from his liability to compensation. *Newark Paving Co. v. Klotz* (1914) 85 **N. J. L.** 432, 91 Atl. 91, affirmed in 86 **N. J. L.** 690, 92 Atl. 1086.

But under the English act, while an injured workman may proceed either against his employer or against the third person whose negligence caused the injury, there cannot be a recovery both of compensation and of damages, and the recovery of one terminates the right to proceed for the other. *Mahomed v. Maunsell* (1907; **C. C.**) 124 **L. T. Jo. (Eng.)** 153, 1 **B. W. C. C.** 269; *Tong v. Great Northern R. Co.* (1902; **Div. Ct.**) 86 **L. T. N. S. (Eng.)** 802, 66 **J. P.** 677, 18 **Times L. R.** 566.

If a workman has received full compensation from his employers his dependents cannot thereafter bring an action based upon fault against the third person whose negligence was alleged to have caused the injury. *Gray v. North British R. Co.* (1914) 52 **Scot. L. R.** 144, 8 **B. W. C. C.** 373.

Where a workman in a colliery also carries on a small farm and while occupied as a collier was injured by the negligence of a third person and recovered compensation from his employer, he cannot thereafter, bring an action for damages against the third party and recover damages for the injury which he had suffered as a farmer although such damages were not included in the compensation. *Woodcock v. London & N. W. R. Co.* [1913] 3 **K. B. (Eng.)** 139, 82 **L. J. K. B. N. S.** 921, 109 **L. T. N. S.** 253, 29 **Times L. R.** 566, [1913] **W. N.** 179, [1913] **W. C. & Ins. Rep.** 563, 6 **B. W. C. C.** 471.

Acceptance of a settlement from a third person whose negligence caused the injury prevents the workman from securing compensation against his employer. *Cripps's Case* (1914) 216 **Mass.** 586, 104 **N. E.** 565, **Ann. Cas.** 1915B, 828.

But an injured workman cannot, by accepting a settlement from a third party whose negligence caused his injury, deprive his widow of her right to compensation, where the workman subsequently dies of his injury. (**Mass.**) *Ibid.*

The acceptance by an injured workman of weekly payments from a person other than the employer, who was alleged to be liable for the injury, bars **L.R.A.** 1916A.

any claim for compensation against the employer, although the liability of such third person was not admitted and no action against him had been commenced. *Page v. Burtwell* [1908] 2 **K. B. (Eng.)** 758, 77 **L. J. K. B. N. S.** 1061, 99 **L. T. N. S.** 542.

And the fact that the workman expressly reserved his right to compensation in no wise affects the result. *Mulligan v. Dick* (1904) 6 **Sc. Sess. Cas.** 5th Series, 126, 41 **Scot. L. R.** 77, 11 **Scot. L. T.** 433; *Murray v. North British R. Co.* (1904) 6 **Sc. Sess. Cas.** 5th Series, 540, 41 **Scot. L. R.** 383, 11 **Scot. L. T.** 746.

But an employee who, having received one payment under the act without qualifications, which payment was offered voluntarily by the employer, refused to sign any other receipt except subject to the reservation "without prejudice," subject to which other payments had been received, does not exercise the option referred to in the English statute, so as to preclude him from proceeding against other persons liable for the injury. *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 **K. B. (Eng.)** 639, 72 **L. J. K. B. N. S.** 857, 89 **L. T. N. S.** 318, 19 **Times L. R.** 697, 52 **Week. Rep.** 200, 9 **Asp. Mar. L. Cas.** 436.

And a workman injured by the neglect of a third person, who received compensation from the employer, expressly reserving his right against the third person, and agreeing that if he recovers damages he will reimburse the employer for the amount of compensation received from him, has not "recovered compensation," so as to preclude him from proceeding against the third person in damages. *Wright v. Lindsay* (1911) 5 **B. W. C. C.** 31, 49 **Scot. L. R.** 210.

The findings by the arbitrator that the third person was guilty of negligence will not be disturbed by the court of appeals if there is some evidence to support them. *Cutsforth v. Johnson* [1913] **W. C. & Ins. Rep. (Eng.)** 131, 6 **B. W. C. C.** 28, 108 **L. T. N. S.** 138.

Under the New Jersey act the employer has no right of subrogation to the claim of the workman against the tortfeasor. *Newark Paving Co. v. Klotz* (1913) 85 **N. J. L.** 432, 91 Atl. 91, affirmed in 86 **N. J. L.** 690, 92 Atl. 1068.

Nor can the employer recover from the tortfeasor the compensation which he has paid the employee. *Interstate Teleph. & Teleg. Co. v. Public Service Electric Co.* (1914) 86 **N. J. L.** 26, 90 Atl. 1062, 5 **N. C. C. A.** 524.



But under the Massachusetts act the association in which the deceased is insured may enforce the right given to the employee of proceeding for damages against the negligent third person. *Turnquist v. Hannon* (1914) 219 Mass. 560, 107 N. E. 443. The court said, however, that this right does not amount to the right of equitable subrogation.

While under the English act the employer is entitled to indemnity against any third person whose negligence caused an injury to his workman, for which injury the employer is obliged to pay compensation. *Dickson v. Scott* [1914] W. C. & Ins. Rep. (Eng.) 67, 30 Times L. R. 256, 7 B. W. C. C. 1007; *Daily News v. McNamara & Co.* (1913) 7 B. W. C. C. 11.

Fellow servants of an injured workman, whose negligence caused the injury, are liable to indemnify the employer for any compensation which he is required to pay to the injured employee. *Lees v. Dunkerley Bros.* (1910) 103 L. T. N. S. (Eng.) 467, 55 Sol. Jo. 44; *Bate v. Worsey* [1912] W. C. Rep. (Eng.) 194, 5 B. W. C. C. 276.

But an employer, however, cannot maintain an action for indemnity against a third person, where the negligence of his own employees, together with that of the third person, caused the injury in question. *Cory v. France, F. & Co.* [1911] 1 K. B. (Eng.) 114, 80 L. J. K. B. N. S. 341, 103 L. T. N. S. 649, 27 Times L. R. 18, 55 Sol. Jo. 10, 11 Asp. Mar. L. Cas. 499.

In order that the employer may recover indemnity against a third person, the liability of such person to the injured workman must be proven. *Kemp v. Darnagail Coal Co.* [1909] S. C. 1314, 46 Scot. L. R. 939; *Bradley v. Wallaces* [1913] 3 K. B. (Eng.) 629, 82 L. J. K. B. N. S. 1074, 109 L. T. N. S. 281, 29 Times L. R. 705, [1913] W. N. 239, [1913] W. C. & Ins. Rep. 620, 6 B. W. C. C. 706; *Lanckester v. Miller-Hetherington* (1910) 4 B. W. C. C. (Eng.) 80.

In one case, however, in which the workman had been killed, it was held that the negligent third person was liable to indemnify the employer for the compensation which he was obliged to pay to the workman's dependent, although such dependent, being an illegitimate daughter, could not of herself have had any cause of action against the negligent person. *Smith's Dock Co. v. Readhead* [1912] 2 K. B. (Eng.) 323, 81 L. J. K. B. N. S. 808, 106 L. T. N. S. 843, 28 Times L. R. 397, [1912] W. C. Rep. 217, 5 B. W. C. C. 449, [1912] W. N. 131. L.R.A.1916A.

In order to recover indemnity from a negligent third person, the liability of the employer to pay compensation need not be established by the award of an arbitrator. *Thompson v. North Eastern Marine Engineering Co.* [1903] 1 K. B. (Eng.) 428, 72 L. J. K. B. N. S. 222, 88 L. T. N. S. 239, 19 Times L. R. 206 (employer recovered compensation paid after receiving notice of the accident and of the claim for compensation, but before the other proceedings had been taken).

In an action in rem against a German vessel brought by the owners of an Irish vessel injured by a collision between the two, the owners of the latter vessel cannot include in the damages the amount paid in payment for compensation for injury from fright before the collision took place. See *The Rigel* (1912; Adm.) 106 L. T. N. S. (Eng.) 648, [1912] W. N. 56, 28 Times L. R. 251, L. R. [1912] P. 99, 81 L. J. Prob. N. S. 86.

Costs of the compensation proceedings, as well as the compensation awarded, may be recovered as an indemnity by the employer against the negligent third person. *Great Northern R. Co. v. Whitehead* (1902) 18 Times L. R. (Eng.) 816.

An employee under the Wisconsin act may assign the right of action which he has against the negligent third person, and the assignee may sue thereon in his own name. *McGarvey v. Independent Oil & Grease Co.* (1914) 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 903.

The right of action which an employee has against the third person whose negligence caused his injury passes, in the case of the death of the employee, to his administrator. *Turnquist v. Hannon* (1914) 219 Mass. 560, 107 N. E. 443.

Under the English statute the notice required by rule 19 must be served in an action for indemnity, although the defendant was a party to the compensation proceedings. *Howard v. Driver* (1903) 5 W. C. C. (Eng.) 153; *Appleby v. Horseley Co.* [1899] 2 Q. B. (Eng.) 521, 80 L. T. N. S. 853, 68 L. J. Q. B. N. S. 892, 47 Week. Rep. 614, 15 Times L. R. 410.

But an employer may, if he chooses, bring an action for indemnity under § 6, subsection 2, independently of the general rule as to third party procedure. *Nettleingham & Co. v. Powell* [1913] 3 K. B. (Eng.) 209, 82 L. J. K. B. N. S. 911, 108 L. T. N. S. 912, 29 Times L. R. 578, 57 Sol. Jo. 593, 6 B. W. C. C. 479, [1913] W. C. & Ins. Rep. 424.

W. M. G.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

EMMA G. GAYNOR, Admrx., etc., of Joseph C. Gaynor, Deceased,  
v.

STANDARD ACCIDENT INSURANCE COMPANY, Insurer, Appt.

(217 Mass. 86, 104 N. E. 339.)

**Master and servant — workmen's compensation act — waiter at banquet.**

A waiter employed by a caterer to serve at a particular banquet for a specified price and transportation, with freedom to go where he will when the service is finished, is not within the protection of a workmen's compensation act which provides that employees shall include every person in the service of another under any contract of hire, except one whose employment is but casual, or is not in the usual course of the trade, business, profession, or occupation of the employer.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(February 27, 1914.)

**A**PPEAL by the insurer from a decree of the Superior Court for Suffolk County affirming a decision of the Industrial Accident Board and ordering insurer to pay to a dependent widow a certain amount as compensation for the death of her husband, in a proceeding under the workmen's compensation act. Reversed.

The facts are stated in the opinion.

Messrs. Dickson & Knowles, for appellant:

Deceased was a person whose employment was casual within the meaning of the workmen's compensation act.

Knight v. Bucknill [1913] W. C. & Ins. Rep. 175, 57 Sol. Jo. 245, 6 B. W. C. C. 160; Hill v. Begg [1908] 2 K. B. 802, 24 Times L. R. 711, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 52 Sol. Jo. 581; Rennie v. Reid, 45 Scot. L. R. 814, 1 B. W. C. C. 324; Ritchings v. Bryant [1913] W. C. & Ins. Rep. 171, 6 B. W. C. C. 183; McCarthy v. Norcott, 43 Ir. Law Times, 17; Beven, Employers' Liability & Workmen's Compensation, 4th ed. 457; Aaronson's Workmen's Compensation Acts, 169; Adshed Elliott, Workmen's Compensation Acts, 6th ed.; Dawbarn, Employers' Liability & Workmen's Compensation, 4th ed. 94.

Mr. Edward M. Sullivan, for appellee:

The deceased employee, Joseph C. Gaynor, was not, as a matter of law, a person whose employment was casual within the

meaning of the workmen's compensation act.

Tombs v. Bomford, 106 L. T. N. S. 823, [1912] W. C. Rep. 229, 5 B. W. C. C. 338; Dewhurst v. Mather [1908] 2 K. B. 754, 77 L. J. K. B. N. S. 1077, 99 L. T. N. S. 568, 24 Times L. R. 819, 52 Sol. Jo. 681, 1 B. W. C. C. 328; Johnston v. Monasterevan General Store Co. [1909] 2 I. R. 108, 42 Ir. Law Times, 268, 2 B. W. C. C. 183; Cotter v. Johnson, 45 Ir. Law Times, 259, 5 B. W. C. C. 568.

Rugg, Ch. J., delivered the opinion of the court:

The facts in this case are that the deceased employee was a waiter employed, at the time his injuries were received, by T. D. Cook & Company, Incorporated, caterers, having a regular place of business in Boston. It had a contract to serve a banquet at Mt. Holyoke College, South Hadley, on October 9, 1912, and on the day before engaged the deceased for service at that banquet. Its agent told the deceased that if he would report at the South Station in Boston the next morning, he could go to South Hadley at its expense with the other waiters. The wage for the service was to be \$4, together with transportation from Boston to South Hadley and return. The deceased reported at 7 o'clock in the morning of October 9th, reached South Hadley at half past 11 o'clock in the forenoon, and was injured while preparing to serve the banquet. This was the first time he had ever worked for this employer. The work was finished at 5 o'clock in the afternoon, and the decedent then would have been entitled to \$4, and would have been at liberty either to return to Boston at the expense of his employer or go elsewhere on his own account. It was a part of the regular business of the employer to provide and serve banquets, but for such service no men were regularly employed. The custom of the catering business is that such banquets are served by waiters secured for the particular occasion. Such waiter might work for different employers on the same day, or for many different employers on successive days. The point to be decided is whether the deceased was an employee as defined in the workmen's compensation act (Stat. 1911, chap. 751, pt. 5, § 2) as follows: "Employee" shall include every person in the service of another under any contract of hire, express or implied, oral or written, . . . except one whose employment is but casual, or is not in the usual course of the trade, business, profession, or occupation of his employer."

The crucial words to be construed are those contained in the exception out of the

**Note.** — As to who are "casual" employees within the meaning of the workmen's compensation act, see annotation following this case, post, 365.  
L.R.A.1916A.



class of employee of "one whose employment is but casual." The word "casual" is in common use. Its ordinary signification, as shown by the lexicographers, is something which comes without regularity, and is occasional and incidental. Its meaning may be more clearly understood by referring to its antonyms which are "regular," "systematic," "periodic" and "certain." The significance of this exception in our act is emphasized by its contrast with the provisions of the English act, which is different in a material respect. As is pointed out in *Hill v. Begg* [1908] 2 K. B. 802, at 805, its words descriptive of the workman are not one whose employment is but casual, but one "whose employment is of a casual nature, and . . . otherwise than for the purposes of the employer's trade or business." This difference in phraseology cannot be treated as unintentional, but must be regarded as deliberately designed. See Report of Massachusetts Commission on Compensation for Industrial Accidents, 53. Manifestly its effect is to narrow the scope of our act as compared with the English act. No one whose employment is "casual" can recover here, while there one whose employment is "of a casual nature" comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may be founded upon the difference between the modifying word "casual" used in our act, and the words "of a casual nature" in the English act. The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of decision in *Knight v. Bucknill*, 6 B. W. C. C. 160, [1913] W. C. & Ins. Rep. 175, 57 Sol. Jo. 245. This consideration is to be noted because the English act was followed closely in many respects by our act, and hence even slight differences of phraseology may be assumed to have significance.

But even the decisions under the English act are plain to the effect that employment such as that which existed in the case at bar there would be treated not only as casual in the respect of the contract for hiring, but also casual in its nature. In *Hill v. Begg* [1908] 2 K. B. 802, 24 Times L. R. 711, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 52 Sol. Jo. 581, the employment of one who cleaned the windows of a private dwelling house whenever needed, at irregular intervals of about six weeks, for a period of two years, but without regular engagement, was held to be "of a casual na-  
L.R.A.1916A.

ture." See also *Rennie v. Reid*, 45 Scot. L. R. 814, 1 B. W. C. C. 324, and *Ritchings v. Bryant*, 6 B. W. C. C. 183, [1913] W. C. & Ins. Rep. 171, where the facts were similar and like decisions were made. One who had been employed at several different times to do odd jobs about small cottages, and who at the time in question was hired to whitewash some of them at a fixed price for the whole work, was treated as plainly a casual laborer in *Bargewell v. Daniel*, 98 L. T. N. S. 257. One employed to cut a hedge for a gross price was held to be a casual laborer in *Toombs v. Bomford*, 106 L. T. N. S. 823, [1912] W. C. Rep. 229, 5 B. W. C. C. 338. To the same effect are *Knight v. Bucknill*, 6 B. W. C. C. 160, 57 Sol. Jo. 245. [1913] W. C. & Ins. Rep. 175; *Johnston v. Monasterevan General Store Co.* 42 Ir. Law Times, 268, [1909] I. R. 108, 2 B. W. C. C. 183; *Cotter v. Johnson*, 45 Ir. Law Times, 259, 5 B. W. C. C. 568. See also *O'Donnell v. Clare County Council*, 47 Ir. Law Times, 41, 43, [1913] W. C. & Ins. Rep. 273, 6 B. W. C. C. 457; *McCarthy v. Norcott*, 43 Ir. Law Times, 17.

It is argued that "or" in the clause quoted from part 5, § 2, should be construed to mean "to wit," or identity with or explanation of that which goes before. Sometimes it is necessary to attribute this signification to the word in order to effectuate the plain legislative purpose. *Com. v. Grey*, 2 Gray, 501, 61 Am. Dec. 476; *Brown v. Com.* 8 Mass. 59. It often is construed as "and" in order to accomplish the intent manifested by the entire act or instrument in which it occurs. This frequently is necessary in the interpretation of wills. *McClench v. Waldron*, 204 Mass. 554, 557, 91 N. E. 126; *Clarke v. Andover*, 207 Mass. 91, 96, 92 N. E. 1013. It is not synonymous with "and" and is to be treated as interchangeable with it only when the obvious sense requires it, or when otherwise the meaning is dubious. But the word "or" in its ordinary use and also in accurate meaning is a disjunctive particle. It marks an alternative, and not a conjunctive. It indicates one or the other of two or several persons, things, or situations, and not a combination of them. *Com. v. Keenan*, 139 Mass. 193, 29 N. E. 477; *Galvin v. Parker*, 154 Mass. 346, 28 N. E. 244; *Dumont v. United States*, 98 U. S. 142, 25 L. ed. 65. It is construed as having a different meaning only when the context and the main purpose to be accomplished by all the words used seem to demand it. This is not such a case. It is impossible to say that the legislature did not intend to employ the word in its common significance. Indeed, from what has been said, and especially from the deliberate use upon this point

of different words from those of the English act, which our act follows in so many particulars, the opposite conclusion is necessary.

It would be difficult to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar. The engagement was for a single day and for one occasion only. It involved no obligation on the part of the employer or employee beyond the single incident of the work for four or five hours at the college. That would have had its beginning and ending, including the outward and returning journeys (but for the unfortunate accident), within a period of less than twenty-four hours. The relation between the waiter and the caterer had no connection of any sort with any events in

the past. Each was entirely free to make other arrangements for the future, untrammelled by any express or implied expectations of further employment. The employment was not periodic and regular, as in *Gillen's Case*, 215 Mass. 96, post, 371, 102 N. E. 346, and in *Dewhurst v. Mather* [1908] 2 K. B. 754, 77 L. J. K. B. N. S. 1077, 99 L. T. N. S. 568, 24 Times L. R. 819, 52 Sol. Jo. 681, 1 B. W. C. C. 328. It was in the course of the regular business of the employer. But under our act that is an immaterial circumstance in view of the other fact that the employment was "but casual." The conclusion seems irresistible that the employment of the deceased was "but casual" within the meaning of those words in our act.

Decree reversed.

### Annotation—Who are "casual" employees within the meaning of the workmen's compensation act.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

The difference between the phraseology of the English act and that of Massachusetts has been sufficiently set out in the opinion in *GAYNOR v. STANDARD ACCI. INS. CO.*

An employee hired for no fixed duration of time and for no particular job, but hired only as the employer might wish work to be done, is not within the protection of the Massachusetts statute. *Chevers's Case* (1914) 219 Mass. 244, 106 N. E. 861 (teamster employed by coal dealer whenever he wanted him, but only at long intervals).

A court cannot assume that an employment was only casual where the Industrial Board has found that the employment was not casual, and only excerpts of the evidence are contained in the record, although such excerpts tend to show that the employment was casual. *King's Case* (1915) 220 Mass. 290, 107 N. E. 959.

Under the New Jersey act an employment is not "casual" where one is employed to do a particular part of a service recurring with some regularity, with a fair expectation of a continuance for a reasonable period (*Sabella v. Brasileiro* (1914) 86 N. J. L. 505, 91 Atl. 1032, 6 N. C. C. A. 958, long shoreman frequently called upon by defendant to serve him in loading and unloading the ship); nor is the employment of a workman for an indefinite period of time at so much a day (*Scott v. Payne Bros.* (1914) 85 N. J. L. 446, 89 Atl. 927, 4 L.R.A.1916A.

*N. C. C. A.* 682); an employment for an indefinite time to do piecework may be found not to be casual (*Shaeffer v. De Grottola* (1914) 85 N. J. L. 444, 89 Atl. 921, 4 N. C. C. A. 582, affirmed in — *N. J. L.* —, 94 Atl. 1103).

A charwoman employed regularly every Friday and every other Tuesday for over eighteen months is not in the casual employment of her employer. *Dewhurst v. Mather* [1908] 2 K. B. (Eng.) 754, 77 L. J. K. B. N. S. 1077, 99 L. T. N. S. 568, 24 Times L. R. 819, 52 Sol. Jo. 681, 1 B. W. C. C. 328.

Window washers or cleaners have been held not to be in the regular employment, but only in the casual employment of their employers, so as not to be within the provisions of the compensation act. *Hill v. Begg* [1908] 2 K. B. (Eng.) 802, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 24 Times L. R. 711, 52 Sol. Jo. 581; *Ritchings v. Bryant* [1913] W. C. & Ins. Rep. (Eng.) 171, 6 B. W. C. C. 183.

The work of cutting down or lopping off trees, which is done by a workman incidentally in connection with other work, is casual. *M'Carthy v. Norcott* (1908) 43 Ir. Law Times, 17; *Knight v. Bucknill* [1913] W. C. & Ins. Rep. (Eng.) 175, 57 Sol. Jo. 245, 6 B. W. C. C. 160.

But a workman employed each season for several weeks or even months at a time, to do work in the employer's woods cutting underwood, trimming trees, etc., and paid by the week, not losing any time because of rain, is not a casual laborer. *Smith v. Buxton*



(1915) 84 L. J. K. B. N. S. (Eng.) 697, 112 L. T. N. S. 893 [1915] W. C. & Ins. Rep. 126, 8 B. W. C. C. 196.

The owner of a small garden which is surrounded by a high hedge on the land of a farmer is entitled to compensation from the latter for personal injuries

received while engaged in trimming the hedge for pay at the request of the farmer, on a complaint that the hedge was so tall as to shade his garden. *Tombs v. Bomford* [1912] W. C. Rep. (Eng.) 229, 106 L. T. N. S. 823, 5 B. W. C. C. 338. W. M. G.

### WISCONSIN SUPREME COURT.

NORTHWESTERN IRON COMPANY,  
Respt.,  
v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Appts.

(154 Wis. 97, 142 N. W. 271.)

#### Master and servant — workman's compensation act — wife in foreign countries — living together.

1. A wife who was left in a foreign land when her husband came to this country is within the provisions of a workman's compensation act providing a benefit for persons wholly dependent on an employee killed in service, that a wife shall be conclusively presumed to be solely and wholly dependent upon her husband, with whom she was living at the time of his death, if he sends her money for her support, although he has been here several years, and no definite plan for reunion exists.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — determination by Commission.

2. Whether or not a servant accidentally killed in his employment, and his wife, whom he left in a foreign country, were living together, is a question of fact, to be determined by the Commission under the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Trial — question of law — man and wife living together.

3. The court must determine what constitutes living together under a provision in a workman's compensation act providing that a wife shall be presumed wholly dependent upon her husband with whom she is living at the time of his death.

*For other cases, see Courts, I. c, in Dig. 1-52 N. S.*

#### Same — intent — question of fact.

4. Intent is ordinarily a question of fact. *For other cases, see Trial, II. c, 5, in Dig. 1-52 N. S.*

(Barnes, J., dissents in part.)

(May 31, 1913.)

**Note.** — As to when husband and wife are living together within the meaning of the compensation act, see annotation following this case, post, 370.  
L.R.A.1916A.

**A**PPEAL by defendants from a judgment of the Circuit Court for Dane County in plaintiff's favor in a proceeding to set aside an award of the Industrial Commission in a proceeding to recover damages for the death of one of plaintiff's employees for which it was alleged to be responsible. Reversed.

#### Statement by Kerwin, J.:

This is an appeal by defendants from a judgment entered February 14, 1913, setting aside an award of the Industrial Commission made July 1, 1912. The award provided that plaintiff pay to the defendant Jela Nevadjic the sum of \$2,100 on account of the death of her husband by reason of injuries accidentally sustained by him while in the employ of the plaintiff. The award was based on a finding of the Commission that Jela Nevadjic was living with her husband at the time of his death. The circuit court decided first that, although the finding of the Commission that Jela Nevadjic was living with her husband at the time of his death was erroneous, still the award should be confirmed because there was evidence to support the Commission's finding of total dependency without regard to the statutory presumption.

A motion for rehearing was made in the circuit court, based upon an affidavit of the plaintiff's attorney, setting forth correspondence with the chairman of the Industrial Commission, showing that the Commission "determined that the wife was totally dependent simply because of the statutory presumption following its finding of fact that Nevadjic was living with his wife at the time of his death." On rehearing, the circuit court adhered to its decision that Jela Nevadjic was not living with her husband at the time of his death, but found that the Commission's finding of total dependency was based solely upon the statutory presumption, and further found that in making such findings and the award the Commission acted without or in excess of its powers, and entered judgment setting aside the award of the Commission. The Industrial Commission made the following findings: "That on February 25, 1912, while in the employ of the respondent

[plaintiff here], one Prokopia Nevadjic accidentally sustained personal injuries by reason of a car of ore being dumped upon him, from the result of which he died, at Mayville, Wisconsin; . . . that the said deceased, Prokopia Nevadjic, came to this country some three years and three months prior to his death, leaving in his native country, Austria-Hungary, in the province of Korenica, a wife and one child; after coming to this country, the said deceased, Prokopia Nevadjic, did not return to his wife, but did occasionally send her money, and on February 8, 1912, shortly before his death, sent her the sum of \$21; that deceased could not write, and the wife of deceased could not write, but they corresponded with each other through the aid of friends; and we find from these facts that the deceased, Prokopia Nevadjic, and the above-named Jela or Jelena Nevadjic, his wife, were living together at the time of the death of said deceased, and the said Jela or Jelena Nevadjic was solely and wholly dependent for support upon the deceased, Prokopia Nevadjic."

It also appears from the evidence that Prokopia Nevadjic came to Mayville and "was employed by the Northwestern Iron Company on the 7th of November, 1911;" that he sent \$30 to his wife "when he first came to Mayville;" that he said if "I don't send money every three months my wife can't make a living;" that he sent \$21 to his wife February 8, 1912, an interval of exactly three months from the time of his previous remittance.

Messrs. **Kahn & Murphy**, for appellant Nevadjic:

The widow was living with her husband at the time of his death.

Ex parte *Gilmore*, 3 C. B. 967; *Blackwell v. Pennant*, 9 Hare, 551, 22 L. J. Ch. N. S. 155, 16 Jur. 420; *Cowan v. Cowan*, 10 Colo. 540, 16 Pac. 215; *Allgood v. Williams*, 92 Ala. 551, 8 So. 722; *Shaw v. Shaw*, 98 Mass. 158; *Bristol v. Rutland*, 10 Vt. 574; *Carey's Appeal*, 75 Pa. 201; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; *Hayes v. Hayes*, 74 Ill. 312.

Messrs. **Walter C. Owen**, Attorney General, and **Byron H. Stebbins**, First Assistant Attorney General, for appellant Industrial Commission:

A mere temporary absence does not terminate the living together, because there is no such intent.

Ex parte *Gilmore*, 3 C. B. 967; *Phillips v. Phillips*, 22 Wis. 256; *Thompson v. Thompson*, 53 Wis. 153, 10 N. W. 166; *Williams v. Williams*, 122 Wis. 27, 99 N. W. 431; *Burk v. Burk*, 21 W. Va. 445; *Miller v. Sovereign Camp*, W. O. W. 140 Wis. 505, 28 L.R.A. L.R.A.1916A.

(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126.

The presumption is that husband and wife "are living and cohabiting together."

*Smith v. Smith*, 35 Ind. App. 610, 74 N. E. 1008; *Jonas v. Hirschburg*, 18 Ind. App. 581, 48 N. E. 656; *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587.

The Commission had "reasonable ground for the decision made."

*Clancy v. Fire & Police Comrs.* 150 Wis. 630, 138 N. W. 109; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Minneapolis St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905.

The question was one of fact.

*Traveler's Ins. Co. v. Hollauer*, 131 Wis. 371, 111 N. W. 527; *Cole v. Cole*, 27 Wis. 531; *Thompson v. Thompson*, 53 Wis. 153, 10 N. W. 166; *Morrison v. Madison*, 96 Wis. 452, 71 N. W. 882; *Ennis v. M. A. Hanna Dock Co.* 148 Wis. 655, 134 N. W. 1051; *Hoff v. Hackett*, 148 Wis. 32, 134 N. W. 132.

**Mr. Edward G. Wilmer**, for respondent:

The question of dependency and the extent thereof is always one of fact, and the survivors, including the widow, husband, or children, must establish their claims to compensation by proving the extent of their dependency as a matter of fact.

*New Monckton Collieries v. Kelling* [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687 [1911] W. N. 176, 4 B. W. C. C. 332.

"Living together as husband and wife" requires dwelling together, cohabiting.

18 Am. & Eng. Enc. Law, 823; *Yardley's Estate*, 75 Pa. 207; *Sullivan v. State*, 32 Ark. 187; *State v. Intoxicating Liquors*, 54 Me. 565; *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533; *Dutcher v. Dutcher*, 39 Wis. 651; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723; *Paltrovitch v. Phoenix Ins. Co.* 68 Hun. 304, 23 N. Y. Supp. 38; *Thomas v. State*, 28 Tex. App. 300, 12 S. W. 1098; *Burnett v. State*, 44 Tex. Crim. Rep. 226, 70 S. W. 207; *Hanson v. Hanson*, 111 Mass. 158; *Kendall v. Miller*, 47 How. Pr. 446.

Workmen's compensation acts ought to be construed not in a technical, but in a popular, sense.

*Smith v. Coles* [1905] 2 K. B. 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754; *Rogers v. Cardiff Corp.* 8 W. C. C. 51, [1905] 2 K. B. 832, 54 Week. Rep. 35, 22 Times L. R. 9, 75 L. J. K. B. N. S. 22, 4 L. G. R. 1, 70 J. P. 9, 93 L. T. N. S. 683; *Adams v. Shaddock* [1905] 2 K. B. 859, 54 Week. Rep. 97,



22 Times L. R. 15, 75 L. J. K. B. N. S. 7, 93 L. T. N. S. 725.

The Commissioner's error was one of law, and the judgment of circuit court should be affirmed.

*Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527; *State v. Schmidt*, 138 Wis. 53, 119 N. W. 647.

**Kerwin, J.**, delivered the opinion of the court:

The judgment of the court below, setting aside the award of the Industrial Commission, rests upon the conclusion of the court that the Industrial Commission acted without or in excess of its powers in finding that the appellant Jela Nevadjic was living with her husband at the time of his death. The question, therefore, presented on this appeal is whether the Commission acted without or in excess of its powers in making such finding.

Subsection 3, § 2394—9, of the workmen's compensation act provides a death benefit "in case the deceased employee leaves a person or persons wholly dependent on him for support."

Subsection 3, § 2394—10, provides:

"3. The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she is living at the time of his death.

"(b) A husband upon a wife with whom he is living at the time of her death.

"(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

"In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employee.

The Industrial Commission in its opinion filed in the case with its findings defined the phrase "living together" thus: "We are of the opinion that the husband and wife are to be considered as living together, even though one or the other may be absent from the home for a considerable length of time and separated by great distance; they are living together when they are not living apart, when there is neither legal nor actual separation of the bonds of matrimony." We have been cited to no authority directly in point and have found none where the words "living together" have been construed in a statute similar to the one now before us. L.R.A.1916A.

Authorities are cited by counsel where the words "living together" and similar phrases have been defined in standard dictionaries, and in statutes quite different from the one now before us. And it is argued by counsel for respondent that, giving the words the meaning ascribed to them according to the common and approved usage of the language, they import a dwelling together in the same place.

In giving construction to such statutes, words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject-matter relative to which they are employed.

It has been ruled in England that terms used in the workmen's compensation acts should be given their practical, popular meaning, and that a technical construction should not be placed upon them. *Smith v. Coles* [1905] 2 K. B. 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754; *Rogers v. Cardiff Corp.* 8 W. C. C. 51 [1905] 2 K. B. 832, 54 Week. Rep. 35, 22 Times L. R. 9, 75 L. J. K. B. N. S. 22, 4 L. G. R. 1, 70 J. P. 9, 93 L. T. N. S. 683; *Adams v. Shaddock* [1905] 2 K. B. 859, 54 Week. Rep. 97, 22 Times L. R. 15, 75 L. J. K. B. N. S. 7, 93 L. T. N. S. 725.

Proof of total dependency is dispensed with under the statute where the husband and wife are "living together" at the time of the death of the injured employee. It seems, therefore, quite obvious that the legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marital relation, though there may be physical separation of the parties by time and distance. The "living together" contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words "living together." There must be a legal separation or an actual separation in the nature of an estrangement, else there is a "living together" within the meaning of the statute. This seems to be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there be no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation, or change the relations or obligations created by the marriage contract.

The circuit judge below conceded in his opinion in the record that temporary absence from home or from the place at which the other spouse resides would not warrant a finding that the wife was not living with the husband, if death occurred during such temporary absence, and that there is no fixed rule as to the length of time that will take the case out of the statutory presumption of dependency. But he further held that the limit as to time had been exceeded in the instant case. In this conclusion we think the court below erred. There seems to be no solid reason why an absence of a month or a year or less should require a different construction of the words "living together" than an absence of three years and three months or more. The question does not turn on time or distance, but upon the nature and character of the absence and the intention of the parties respecting it. Intent is an important element in determining the nature of absence. *Ex parte Gilmore*, 3 C. B. 967; *Williams v. Williams*, 122 Wis. 27, 99 N. W. 431; *Thompson v. Thompson*, 53 Wis. 153, 10 N. W. 166; *Miller v. Sovereign Camp*, W. W. 140 Wis. 505, 28 L.R.A. (N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126.

The status of the parties was established by their relation as husband and wife in their native country. That relation, having once existed, is presumed to continue. *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587. It may well be that long-continued physical separation, unexplained, might raise an inference that the parties were not living together within the meaning of the statute under consideration, but the proof here is ample to rebut such inference. The intent and purpose of the separation is explained, and the evidence shows that the marital relation continued without break. Time and distance alone cannot sever such relation without intent or purpose to do so.

The findings of the Industrial Commission on questions of fact should not be disturbed if there is a substantial basis for the decision. *State ex rel. N. C. Foster Lumber Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500. But it is claimed by counsel for respondent that the finding to the effect that the deceased and his wife were "living together" is a conclusion of law, and not a finding of fact, and that to hold otherwise would permit the Industrial Commission, a quasi judicial body, to determine the legal significance of any and all parts of the law, and conclude the parties from a judicial construction of the law by the courts.

Whether the parties were living together L.R.A.1916A.

was a question of fact to be tried and determined by the Commission. *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527. What constitutes "living together" where the facts are undisputed and no conflicting inferences can be drawn from the evidence is a question of law for the court.

In the instant case the Commission made its findings upon the facts leading up to the conclusion of ultimate fact which it stated, viz., that the parties were living together. The facts found formed the basis for the conclusion that the parties were living together, and the Commission had reasonable ground for the decision. *Clancy v. Fire & Police Comrs.* 150 Wis. 630, 138 N. W. 109. "Findings of fact," as recognized by the decisions of this court, mean findings of ultimate, rather than evidentiary, facts. *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; *McDougal v. New Richmond Roller Mills Co.* 125 Wis. 121, 103 N. W. 244; *Travelers' Ins. Co. v. Hallauer*, supra; *Cole v. Cole*, 27 Wis. 531. It is only when the facts are undisputed and no conflicting inference respecting the ultimate fact can be drawn therefrom that the question becomes one of law. *Ennis v. M. A. Hanna Dock Co.* 148 Wis. 655, 134 N. W. 1051.

The question of intent was an important factor in determining whether the parties were living together. This is ordinarily a question of fact. *Hoff v. Hackett*, 148 Wis. 32, 134 N. W. 132. We think the inference drawn by the Commission that Jela Nevadjic and her husband were living together at the time of his death is supported by the established facts.

The judgment is reversed, and the cause remanded to the Circuit Court, with instructions to affirm the award of the Industrial Commission. No costs will be allowed in this court, except that respondent pay the clerk's fees.

**Barnes, J.**, concurring (filed June 2, 1913):

The court has construed the statute in this case as meaning that, where husband and wife have been separated for a considerable length of time without intention to sever their marital relations, they were living together. I agree with this construction of the statute. I do not agree that the question of whether or not they were living together is one of fact in this case. There is no dispute whatever in the evidence. Had the Commission and the circuit court decided under the established facts that the parties were not living together, this court would necessarily have to reverse their judgment because of the interpretation placed



upon the statute. The only ultimate fact that could be involved in this case was whether an intention to sever the marriage relation could have been inferred from the evidence. That question being resolved in favor of the claimant, I think the question of whether they were in fact living together

within the meaning of the statute was purely a question of law. This matter is not of any particular importance in the present case, but may be in future cases that are liable to arise under the Industrial Commission Act.

### **Annotation—When are husband and wife living together within the meaning of the compensation act.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

There appears to be no case other than the *NORTHWESTERN IRON CO. v. INDUSTRIAL COMMISSION* which passes upon the question, When are a husband and wife living together within the meaning of the compensation acts? As it said in this decision, the terms used in these acts are usually to be given their practical and popular meaning, and undoubtedly all the courts would agree with the Wisconsin court in holding that the "living together" contemplated by the statute was intended to cover cases where there was no break in the marriage relation, although there might be a physical separation of the parties by time and distance.

Under a majority of the statutes the right of persons to recover for the death of a workman depends upon the question whether or not the claimants are dependent upon the deceased workman. Ordinarily in the case of a widow there is a presumption of dependency, although such presumption will not be indulged by all of the courts. If, however, the parties are not living together, as a matter of fact, whether there be an actual legal separation, or whether one of the parties has deserted the other, such presumption no longer exists, and the question of dependency then becomes a question of fact to be determined from all of the circumstances of the case. It has been held by the Massachusetts court in *Gallagher's Case* (1914) 219 *Mass.* 140, 106 N. E. 558, that the conclusive presumption that a wife is totally dependent upon her husband does not apply to a case where she is actually living apart from him, although this condition may exist without fault on her part.

So it is held that the conclusive presumption of dependency does not exist where the couple were voluntarily living apart, and the wife was supporting herself out of her own earnings. *Nelson's Case* (1914) 217 *Mass.* 467, 105 N. E. 357, 5 N. C. C. A. 694.

The rule that the conclusive presumption

of dependency cannot be indulged where a wife is living apart from her husband at the time of his death was also applied in *Bentley's Case* (1914) 217 *Mass.* 79, 104 N. E. 432, 4 N. C. C. A. 559.

A wife who has supported herself without the aid of her husband or knowledge of his whereabouts for upwards of six years is not an actual dependent upon him within the meaning of the New Jersey act. *Batista v. West Jersey & S. R. Co.* (1913) — *N. J. L.* —, 88 *Atl.* 954.

Under the English act, the question of the dependency of a wife not living with her husband is wholly a question of fact.

Thus, although a workman has turned his wife out of doors and she has lived in a separate place from him for eleven years, receiving no support from him, she may be found to be wholly dependent upon him. *Medler v. Medler* (1908; C. C.) 124 *L. T. Jo.* (*Eng.*) 410, 1 *B. W. C. C.* 332.

And the mere fact that a workman had, when out of work, left his wife, and had remained away until his death, some time afterward, does not prevent her from being a dependent upon him. *Coulthard v. Consett Iron Co.* [1905] 2 *K. B.* (*Eng.*) 869, 22 *Times L. R.* 25, 75 *L. J. K. B. N. S.* 60, 54 *Week. Rep.* 139, 93 *L. T. N. S.* 756; *Reg. v. Clarke* [1906] 2 *I. R.* (*Ir.*) 135.

Although the mere fact that a man has deserted his family does not preclude them from recovering compensation for his death, nevertheless a deserted wife may, by her conduct, estop herself from claiming to be a dependent. *New Monckton Collieries v. Keeling* [1911] *A. C.* (*Eng.*) 648, 80 *L. J. K. B. N. S.* 1205, 105 *L. T. N. S.* 337, 27 *Times L. R.* 551, 55 *Sol. Jo.* 687, [1911] *W. N.* 176, 4 *B. W. C. C.* 332 (wife supported herself for more than twenty years); *Polled v. Great Northern R. Co.* (1912) 5 *B. W. C. C.* (*Eng.*) 620 (wife deliberately separated from her husband); *Lee v. The Bessie* [1912] 1 *K. B.* (*Eng.*) 83, [1912] *W. N.* 222, 105 *L. T. N. S.* 659, 81 *L. J. K. B. N. S.* 114, [1912] *W. C. Rep.* 57, 12 *Asp. Mar. L. Cas.* 89, 5 *B. W. C. C.* 55, *Ann.*

Cas. 1913E, 477 (deserted wife subsequently lived with another man).

Under the English act of 1897, as applied in Scotland, a woman living apart from her husband, who only contributed a small sum to her support, the rest of her sustenance being obtained from relatives and occasional employment, may claim compensation for his death. *Cunningham v. M'Gregor* (1904) 3 Sc. Sess. Cas. 5th series, 775, 38 *Scot. L. R.* 574, 9 *Scot. L. T.* 36, followed in *Sneddon v. Addie & Sons' Colliery Co.* (1905) 6 Sc. Sess. Cas. 5th series, 992, 41 *Scot. L. R.* 826, 12 *Scot. L. T.* 229, where it was held that a woman unable to do anything for her own support is entitled to compensation for the death of her husband, although he had deserted her.

The wife of a foreigner who came to Scotland, and during eight months' residence forwarded her the sum of £1, may

be found to be a dependent, but not wholly dependent upon her husband, where she supported herself sometimes by earnings as an outdoor laborer at a small wage. *Baird v. Birsztan* (1906) 8 Sc. Sess. Cas. (*Scot.*) 5th series, 438.

But if, as a matter of fact, the wife receives nothing at all from her husband, who had left her, she is not a dependent upon him. *Lindsay v. M'Glashan* [1908] S. C. 762, 45 *Scot. L. R.* 559; *Turners v. Whitefield* (1905) 6 Sc. Sess. Cas. 5th series, 822, 41 *Scot. L. R.* 631, 12 *Scot. L. T.* 131.

A woman deserted by her husband, and having no title to sue for damages or solatium for the death of her son, has no title to claim compensation under the act as a dependent upon him. *Campbell v. Barelay* (1904) 6 Sc. Sess. Cas. 5th series, 371, 41 *Scot. L. R.* 289, 11 *Scot. L. T.* 682. W. M. G.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

BARNEY GILLEN

v.

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, Appt.

(215 Mass. 96, 102 N. E. 346.)

#### Master and servant — employers' liability act — different employers — working part time.

The compensation to be made to an injured longshoreman who has worked for the person in whose employment he is injured only a limited number of hours per week, and whose employer, at the time of the injury, employed no longshoremen continuously, is to be ascertained, where the injured person puts in his full time by working for different employers, upon the basis of the average weekly compensation earned by longshoremen in that locality, under a workmen's compensation act providing that the amount to be paid injured employees shall be ascertained, in case of persons continuously employed, by ascertaining their average weekly earnings for the year past, and where, by reason of shortness of the term of employment, it is impracticable to compute the average weekly wages for the year, regard shall be had to the average weekly amount which, during the twelve months previously to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the

same grade, in the same class of employment, and in the same business.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(May 24, 1913.)

**A**PPEAL by defendant from a judgment of the Superior Court for Suffolk County approving a decision of the Industrial Accident Board on review in a proceeding to fix the compensation to be paid to an injured longshoreman under the workmen's compensation act. Affirmed.

The facts are stated in the opinion.

Mr. James T. Connolly for appellant.

Mr. James E. McConnell, for appellee:

The court may look at what are the average earnings of a casual dock laborer in the same district.

*Perry v. Wright* [1908] 1 K. B. 441, 98 L. T. N. S. 327, 77 L. J. K. B. N. S. 236, 24 Times L. R. 186, 1 B. W. C. C. 351; *Anslow v. Cannock Chase Colliery Co.* [1909] 1 K. B. 352, 78 L. J. K. B. N. S. 154, 99 L. T. N. S. 901, 25 Times L. R. 167, 53 Sol. Jo. 132, [1909] A. C. 435, 78 L. J. K. B. N. S. 679, 100 L. T. N. S. 786, 25 Times L. R. 570, 53 Sol. Jo. 519.

The object of the act is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident.

*Cain v. Leyland & Co.* [1908] 1 K. B. 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 368.

**Note.** — As to "average weekly earnings" under compensation act of workman employed by several employers, see annotation following this case, post, 373. L.R.A.1916A.



Rugg, Ch. J., delivered the opinion of the court:

This is an appeal under the workmen's compensation act (Stat. 1911, chap. 751). The employee, a longshoreman, was injured in the course of his employment by the Canada, Atlantic, & Plant Steamship Company, which was insured under the act with the insurer. The facts are that the steamship company operates a line between Boston and Halifax, one boat in winter and two boats in summer, arriving at and leaving Boston each week. The longshoremen in its employ work on an average for fifteen to twenty hours weekly, and receive from it not more than \$8 a week. The employee, like other longshoremen, worked for other employers during a day or group of days, and earned by the year or by his services an average weekly wage of \$13, which was the average weekly wage earned by other longshoremen in the same class of employment and in the same district. The insurer contends that the employee was not a regular employee of the steamship company, and that his average weekly wages must be the average amount per week which, during the twelve months previous to the injury, was being earned by a person in the same grade, employed at the same work by the same employer. If this contention is sound the employee would be entitled to \$4 per week. The employee contends, however, that inasmuch as he worked continuously at his occupation as longshoreman for different employers, according to the custom of his craft, he is entitled to receive \$6.50, being one half his average weekly earnings as longshoreman from all sources.

The decision depends upon the meaning of "average weekly wages" and the method of their ascertainment as set out in part 5, § 2, of the act. "Average weekly wages" are there defined to mean "earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two, but if the injured employee lost more than two weeks' time during such period, then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted." It is apparent both from its phrase and its context that this sentence applies to a continuous employment throughout the year. While the language is not amplified, it refers to substantially uninterrupted work in a particular employment, from which the wages of the employee are derived. The basis is the earning capacity of the workman as shown by such employment. The next clause of the section is: "Where, by reason of the shortness of the time during which the employee has been

in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer." This clause provides a method for the determination of average weekly wages, where the employee, for the reasons stated, has not been in the service for a year, by reference to the wages of others whose employment is substantially continuous. It affords a guide by which to estimate the compensation to be paid to the employee engaged, where there are those in the service of the same employer continuously employed in the same grade at the same kind of work. It is apparent that this clause does not cover the employee's case, because there is no substantially continuous employment of longshoremen by the steamship company during the year. It is obvious from the broad scope of the act and its comprehensive dealing with the whole subject that it was intended to provide for the employee as compensation within the limits specified therein a definite proportion of the amount which he earned weekly. It cannot be presumed that the legislature intended to offer a scheme of accident insurance which would be illusory or barren to large numbers of workmen.

"Weekly wages," as used in the first sentence quoted above, plainly means all the wages which the employee received in the course of a permanent employment, which are all the wages he receives. Where words are used in one part of a statute in a definite sense, it may be presumed, in the absence of a plain intent to the contrary, that they are used in the same sense in other places in the same act. Therefore, we reach the conclusion that average weekly wages, as used in the clause of the act last quoted, was not intended to apply to recurrent periods of brief service at regular intervals, in cases where the entire time of the workmen is devoted to like employment for other employers in the same general kind of business. The final clause of the paragraph defining average weekly wages is as follows: "Or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." This clause affords reference to a general average of like employment in the neighborhood as a standard to be considered. It does not restrict consideration of the matter to the same employer. It applies to a case like the present, where the custom of the employment is for continuous work of a specified kind for different employers.

While the language of the definition is not so clear as might be desired, it seems to us to be intended to include in abridged form parts of (1) (b) and (2), (a) and (b) of the first schedule of the English workmen's compensation act. 6 Edw. VII. (1906) chap. 58. It is true that (2) (b) of the English schedule covers a case like the present in express language. But the English act is more minute in many of its provisions, and our act resembles the present English act far more closely than it does the earlier one of Stat. 60 & 61 Vict. chap. 37. Although not stated in precise words, we think that the general import of the act is to base the remuneration to be paid upon the normal return received by workmen for the grade of work in which the particular workman may be classified. This is a case where it is "impracticable" to reach a result which shall be fair to the workman to the extent intended by the act of giving him compensation for average weekly earnings in any other way than by following the course pointed out in the final clause of the defi-

nition. See *Perry v. Wright* [1908] 1 K. B. 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351; *Anslow v. Cannock Chase Colliery Co.* [1909] 1 K. B. 352, 78 L. J. K. B. N. S. 154, 99 L. T. N. S. 901, 25 Times L. R. 167, 53 Sol. Jo. 132, s. c. [1909] A. C. 435, 78 L. J. K. B. N. S. 679, 100 L. T. N. S. 786, 25 Times L. R. 570, 53 Sol. Jo. 519.

This is not a case where the usual employment of the employee is only two or three days in a week, as pointed out in *White v. Wiseman* [1912] 3 K. B. 352, 359, 81 L. J. K. B. N. S. 1195, 107 L. T. N. S. 277, 28 Times L. R. 542, 56 Sol. Jo. 703, 5 B. W. C. C. 654, Ann. Cas. 1913D, 1021, but a case where the condition of the workman is continuous labor in regular employment with different employers. The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based.

Decree affirmed.

### Annotation—"Average weekly earnings" under compensation act of workman employed by several employers.

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

Under the Massachusetts act consideration of the average weekly wages of an injured employee is not restricted to the wages earned from the same employer. *GILLEN v. OCEAN ACCL. & GUARANTEE CORP.*

Under the Michigan act the term "average annual earnings" means the average annual earnings in the employment in which the workman was employed at the time of his injury, although he was engaged in such employment but a portion of each year, and was engaged in other employments during the remaining part of the year. *Andrejwski v. Wolverine Coal Co.* (1914) 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807.

Under the English act of 1897, wages earned from an employer other than the one from whom compensation was sought could not be considered in estimating the average weekly earnings of a workman. *Price v. Marsden* [1899] 1 Q. B. (Eng.) 493, 68 L. J. Q. B. N. S. 307, 47 Week. Rep. 274, 80 L. T. N. S. 15, 15 Times L. R. 184; *Williams v. Poulson* (1899) 16 Times L. R. (Eng.) 42, 63 J. P. 757, 2 W. C. C. 127; *Small v. McCormick* (1899) 1 Sc. Sess. Cas. 5th series, 883, 36 Scot. L. R. 700, 7 Scot. L. T. 35; *Hunter v. Baird*, 7 F. L.R.A.1916A.

(Scot.) 304, as cited in 2 Mews, Eng. Case Law Dig. (1898-07) Supp. 1570; *Bartlett v. Tutton* [1902] 1 K. B. (Eng.) 72, 71 L. J. K. B. N. S. 52, 66 J. P. 196, 50 Week. Rep. 149, 85 L. T. N. S. 531, 18 Times L. R. 35.

But the English statute was greatly extended by the amendment of 1906, and, by the express provisions of ¶ 2 of the first schedule, consideration may be given in a proper case to earnings from employers other than the one from whom compensation is sought. It has been stated that the dominant principle of the amendment is that the earnings are to be computed in the manner best calculated to give the rate per week at which the workman was remunerated. *Perry v. Wright* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351.

The provision of the statute relative to earnings under concurrent contracts of employment has no application where compensation is sought by the dependent of a workman who had worked continuously for over three years for the same employer. *Buckley v. London & I. Docks* (1909) 127 L. T. Jo. (Eng.) 521, 2 B. W. C. C. 327.

And a porter on a wharf working at different times for different shipping companies is not under concurrent con-



tracts of employment, where he takes the second job only after the first one is finished, and a third only after the second one has been completed. *Cue v. Court of London Authority* [1914] 3 K. B. (Eng.) 892, [1914] W. N. 280, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1445, 111 L. T. N. S. 736, 7 B. W. C. C. 447.

The concurrent contract, however, need not be of an ejusdem generis character. *Lloyd v. Midland R. Co.* [1914] 2 K. B. (Eng.) 53, 83 L. J. K. B. N. S. 330, 110 L. T. N. S. 513, 30 Times L. R. 247, 58 Sol. Jo. 249, [1914] W. N. 32 [1914] W. C. & Ins. Rep. 105, 7 B. W. C. C. 72 (railroad employee earned money by working in theater at night); *The Raphael v. Brandy* [1911] A. C. (Eng.) 413, 80 L. J. K. B. N. S. 1067, 105 L. T. N. S. 116, 27 Times L. R. 497, 55 Sol. Jo. 579, 4 B. W. C. C. 307 (retainer fee of stoker in the Royal Naval Reserve taken into consideration in fixing average weekly earnings of stoker).

Money earned by a workman from some source other than the employer from whom compensation is sought is not to be considered where it is not earned under a contract of employment.

*Simmons v. Heath Laundry Co.* [1910] 1 K. B. (Eng.) 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 Times L. R. 326, 54 Sol. Jo. 392, 3 B. W. C. C. 200 (employee in laundry earned money giving music lessons, but not under any regular contract of employment).

But money received as "tips" is to be included in the "average weekly earnings," where the giving and receiving of such tips are notorious. *Penn v. Spiers & Pond* [1908] 1 K. B. (Eng.) 766, 77 L. J. K. B. N. S. 542, 98 L. T. N. S. 541, 24 Times L. R. 354, 52 Sol. Jo. 280, 1 B. W. C. C. 401, 14 Ann. Cas. 335; *Knott v. Tingle Jacobs & Co.* (1911) 4 B. W. C. C. (Eng.) 55; *Hains v. Corbet* (1912) 5 B. W. C. C. (Eng.) 372.

The average weekly earnings do not include weekly payments by way of compensation for a previous accident. *Gough v. Crawshay Bros* [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 374.

Nor do "average weekly earnings" include an amount received from the poor fund. *Gilroy v. Mackie* [1909] S. C. 466, 46 Scot. L. R. 325. W. M. G.

## WISCONSIN SUPREME COURT.

MELLEN LUMBER COMPANY, Appt.,  
v.  
INDUSTRIAL COMMISSION OF WISCONSIN et al., Respts.

(154 Wis. 114, 142 N. W. 187.)

### Master and servant — workman's compensation act — total disability — earning capacity in other calling.

1. One who, by the loss of a thumb and finger on one hand, is disabled from following the particular calling in which he was engaged, is entitled to compensation for total disability regardless of what he may be able to earn in other occupations, under a statute providing that the weekly loss of wages on which the compensation of an injured employee shall be computed shall consist of such percentage of the average weekly earnings of the injured employee as shall fairly represent the proportionate extent of the impairment of his earning capacity "in the employment in which he was working at the time of the accident."

*For other cases, see Master and Servant II. a, 1, in Dig. 1-52 N. S.*

**Note.** — As to consideration of possible earnings of injured employee in other employment, in fixing compensation under compensation acts, see annotation following this case, post, 377.  
L.R.A.1916A.

### Statute — construction — inequitable results — absurdity.

2. That a statute literally interpreted may be inequitable does not make it absurd, so that such interpretation should not be followed.

*For other cases, see Statutes, II. a, in Dig. 1-52 N. S.*

### Same — right to question constitutionality.

3. An employer who has voluntarily accepted the benefit of a workman's compensation act cannot defeat its operation on the theory that it deprives him of due process of law.

*For other cases, see Estoppel, III. k, in Dig. 1-52 N. S.*

(May 31, 1913.)

**A**PPEAL by complainant from a judgment of the Circuit Court for Dane County confirming an award of the Commission under the employers' liability act. Affirmed.

The facts are stated in the opinion.

Messrs. Brown, Pradt, & Genrich, for appellant:

Plaintiff was not totally disabled, and the Commission acted without and in excess of its powers.

*Borgnis v. Falk Co.* 147 Wis. 360, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

If a literal interpretation of any part of a statute would operate unjustly or absurdly, it should be rejected.

Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Huidekoper v. Douglass, 3 Cranch, 1, 2 L. ed. 347; Hawaii v. Manikichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; Somo Lumber Co. v. Lincoln County, 110 Wis. 294, 85 N. W. 1023; Bird v. United States, 187 U. S. 118, 47 L. ed. 100, 23 Sup. Ct. Rep. 42; Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; Church of the Holy Trinity v. United States, 143 U. S. 462, 36 L. ed. 229, 12 Sup. Ct. Rep. 511; Water Power Cases, 148 Wis. 145, 38 L.R.A.(N.S.) 526, 134 N. W. 330.

If the statute will admit of no other interpretation than that which has been announced in this case, it is unconstitutional.

10 Am. & Eng. Enc. Law, 296; Griswold College v. Davenport, 65 Iowa, 633, 22 N. W. 904; Brown v. Levee Comrs. 50 Miss. 468; Re Ah Lee, 6 Sawy. 410, 5 Fed. 899; Cooley, Const. Lim. \*167; Durkee v. Janesville, 28 Wis. 467, 9 Am. Rep. 500; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. (Patten Paper Co. v. Kaukauna Water Power Co.) 90 Wis. 399, 28 L.R.A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Mr. W. Stanley Smith, for respondent Winters:

The workmen's compensation act is constitutional.

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

Messrs. Walter C. Owen, Attorney General, and Byron H. Stebbins, First Assistant Attorney General, for respondent Industrial Commission:

The act is not unconstitutional.

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Ferguson v. Landram, 5 Bush, 230, 96 Am. Dec. 350; Daniels v. Tearney, 102 U. S. 415, 421, 26 L. ed. 187, 189; O'Brien v. Wheelock, 184 U. S. 450, 490, 46 L. ed. 636, 654, 22 Sup. Ct. Rep. 354; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310; Willis v. Wyandotte County, 30 C. C. A. 445, 58 U. S. App. 665, 86 Fed. 876.

Barnes, J., delivered the opinion of the court:

This case arises under the workmen's L.R.A.1916A.

compensation act. One Winters was employed as a shingle sawyer by the plaintiff. While at work he lost the thumb and index finger of his left hand. He was earning to exceed \$750 per year when injured. He applied to the Industrial Commission to fix the amount of compensation which he was entitled to receive. The matter was referred to Hon. A. W. Sanborn to take testimony and make findings and report the same to the Commission. Mr. Sanborn found that the earning capacity of the applicant had been reduced to \$9 per week by reason of the injury, and that he was entitled to recover 65 per cent of the difference between the maximum amount allowable for total disability under the compensation act, to wit, \$14.42 a week, and what he was capable of earning thereafter, to wit, \$9 a week, or \$3.52 a week for a period of fifteen years, or an aggregate of \$2,745.60. The Commission made an award in accordance with these findings.

The plaintiff commenced an action to review these findings, alleging, among other things, that the award had been made without a final hearing before the Commission. This contention was sustained, and the record was remanded for further hearing before the Commission. Thereafter the Commission made a second award. It was found as a fact that Winters was totally incapacitated by the accident from again following the occupation of shingle sawyer. It is not expressly found that the injured employee could engage in other lines of employment, but in the decision filed with the award it is said: "We feel that there are many occupations open to the applicant where he can earn a good wage, and we have little doubt that he will find his place as a useful, self-supporting member of society." The Commission, on the final hearing, awarded the claimant 65 per cent of the maximum allowance, \$14.42 a week, or \$9.37, until the weekly payments aggregated \$3,000, less the sum of \$46.85, which had already been paid.

Among other things, the Commission found: "That, because of the injuries received in said accident, the said applicant, William H. Winters, is totally and permanently disabled so that he cannot return to the employment in which he was working at the time of the accident, and there is a total permanent impairment of his earning capacity in such employment." This second award was confirmed by the court, and plaintiff appeals from the judgment of confirmation.

It is perfectly obvious that the Commission did not find, and did not intend to find, that Winters was incapacitated from engaging in all gainful occupations. It did find



that he was permanently disabled from engaging in the work of shingle sawyer. The Commission construed the compensation act to mean that, where an employee is totally disabled from performing the particular work which he was performing when the injury occurred, he is entitled to recover the maximum allowance for total disability, no matter what his earning capacity may be in other callings. The circuit court came substantially to the same conclusion.

The appeal involves but a single question, and that is a question of law, of statutory construction. The appellant urges that the construction adopted is unreasonable and was not within the contemplation of the legislature; that it is absurd to say that it was intended to give the applicant here, who concededly is capable of earning a substantial wage, the same compensation that he would receive had he lost both his arms or both his legs, and that if such is the meaning of the law, it is unconstitutional because it deprives the employer of his property without due process of law. Some criticism is made by the appellant on the alleged hybrid findings of the Commission, and it is insisted that there should be either a clear-cut finding of total disability or one of partial disability. If the Commission placed the correct interpretation upon the law, its findings were properly made. It found total disability to do a certain kind of work, but not to do all kinds of work, and that the statute made it obligatory upon the Commission to award compensation as for total disability.

The material provisions of the compensation act, §§ 2394—1 to 2394—71, Stat. (1911), are the following:

Section 2394—9:

"(2) If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employee leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

"(a) If the accident causes total disability, 65 per cent of the average weekly earnings during the period of such total disability: Provided that, if the disability is such as not only to render the injured employee entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to 100 per cent of the average weekly earnings.

"(b) If the accident causes partial disability, 65 per cent of the weekly loss in wages during the period of such partial disability.

"(c) If the disability caused by the ac-

cident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivisions (a) and (b), respectively."

"The weekly loss in wages referred to in § 2394—9 shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

If subdivision "b" of § 2394—9, above quoted, stood alone, there could be little doubt about what it meant. But by subdivision 2 of § 2394—10, the legislature explains how the loss of wages for the partial disability provided for in subdivision "b" is to be ascertained and computed. It is "such percentage of the average weekly earnings . . . as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident. . . ." This is just what the Commission allowed; it having found that he was totally incapacitated from performing his former work. This is a new statute, containing a large number of provisions which deal with a new and a complex subject. It may well be that, if the legislature had in mind the concrete case with which we are dealing, it would have provided for such a contingency. It is not very probable that it was intended to give an employee who lost a thumb and finger of the left hand the same compensation that he would be entitled to receive had he been so maimed that he was totally incapacitated from doing any kind of work. If this is so, then it is apparent that the legislature overlooked the contingency with which we are dealing, or it in fact has provided that the future earning capacity of the employee must be taken into account. If the former is the correct diagnosis, then the remedy rests with the legislature. It is its function to amend the act where amendment is found necessary. The fact that injustice may result in the instant case is nothing that concerns the courts unless some constitutional right of the appellant is being invaded. The plain and obvious meaning of the language used in a statute is generally the safest guide to follow in construing it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite as apt to lead to an amendment of a law by judicial construction as

it is to arrive at the actual thought in the legislative mind. Where a statute plainly says, as this one does, that the loss in case of partial disability shall consist of such percentage of the weekly earnings of the employee as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, we fail to see how the court would be justified in adding thereto the following limitation: "Less such sums as the employee might be able to earn in some other calling." This in effect is what the court would have to do if it adopted the construction for which the appellant contends. There is nothing doubtful, obscure, or ambiguous about the language used.

It is argued that a literal interpretation of a statute should not be followed where such interpretation would lead to an absurd consequence. The statute in question may be inequitable, but this does not make it absurd. It was at one time urged that the courts might mitigate the rigor of harsh statutes by adopting a rule of equitable construction by which exceptions might be read into such statutes. It never obtained in this state, nor to any considerable extent in this country. It was disposed of by Chief Justice Dixon in *Encking v. Simmons*, 28 Wis. 272, 277, in the following language: "The proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain language of a statute, and in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience, has been too long and too frequently rejected to be now the subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded, and the rule now universally recognized and

acted upon is that, whatever else may be done with the words of a statute, they may never, in the language of Lord Bacon, 'be taken to a repugnant intent.'" See further, *Harrington v. Smith*, 28 Wis. 43.

The law as it reads has the merit of being explicit as to the amount of compensation which the employee shall receive, although it bears rather heavily on the employer in a case like the one under consideration.

Where the language used in a statute is plain, the court cannot read words into it that are not found therein either expressly or by fair implication, even to save its constitutionality, because this would be legislation, and not construction. *Rogers-Ruger Co. v. Murray*, 115 Wis. 267, 59 L.R.A. 737, 95 Am. St. Rep. 901, 91 N. W. 657.

Courts in construing statutes look to consequences, but only where there is room for construction by reason of ambiguous language being used, and where a literal construction would lead to some absurd result. *Berger v. Berger*, 104 Wis. 282, 76 Am. St. Rep. 877, 80 N. W. 585; *Sauntry v. Laird, Norton Co.* 100 Wis. 146, 75 N. W. 985; *Gilbert v. Dutruit*, 91 Wis. 661, 65 N. W. 511; *Battis v. Hamlin*, 22 Wis. 669.

The argument that the provision under discussion is violative of the "due process of law" clause of the Federal Constitution cannot prevail. It was optional with the appellant to come in under the compensation act or to stay out. It elected to take the former course. It accepted the provisions of the act as they were, the burdens as well as the benefits, and so long as it remains under the law it must take the statute as it finds it. *Daniels v. Tearney*, 102 U. S. 415, and cases cited page 421, 26 L. ed. 187, 189; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310.

Judgment affirmed.

### Annotation—Consideration of possible earnings of injured employee in other employment, in fixing compensation under compensation acts.

As to application and effect of workmen's compensation acts, generally, see annotation, ante, 23.

As is stated in *MELLEN LUMBER CO. v. INDUSTRIAL COMMISSION*, it is quite probable that the legislature did not have in mind the concrete case presented by the facts in that case, and did not intend to give an employee who had lost only a thumb and finger of the left hand the same compensation that he would have been entitled to receive had he been so

mained that he was totally incapacitated from doing any kind of work.

In a number of statutes, provision is expressly made for the awarding of compensation based upon the difference between what the workman had been earning at the time of the injury, and what he was able to earn in some suitable employment after his injury.

There is such a provision in the Kansas statute, and in *Roberts v. Charles Wolff Packing Co.* (1915) 95 Kan. 723,



149 Pac. 413, it was held that the compensation to be awarded a workman who, before his injury, was earning \$12 a week, and after the injury was able to earn but \$3 a week, was 50 per cent of the difference, namely, \$4.50 per week.

The English statute expressly provides that in case of partial incapacity, "the weekly payment cannot exceed the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or able to earn in some suitable employment or business after the accident."

In a large number of cases arising under the English statutes, consideration has been given to the earnings of the employee in another "suitable" employment; but these cases turn rather upon the question of the duty of the workman to seek other employment, than on the question whether the wages earned by him are to be considered. Consequently they will not be discussed at this place; they will be found set out and discussed at length in the note on the application and effect of workmen's compensation acts generally, at page 143.

The attitude of the English court is well indicated by the decision in Cam-

mell, L. & Co. v. Fladd (1908) 2 B. W. C. C. (Eng.) 368, where it was held that an unskilled laborer will not be presumed to be incapable of doing any work simply because he is not able to do the old work at which he was employed at the time of his injury.

The English court of appeal has held that the expression "average amount which he may be able to earn after the accident" is not limited to earnings under an employer, but includes earnings in a private business. *Norman v. Walder* [1904] 2 K. B. (Eng.) 27, 73 L. J. K. B. N. S. 461, 68 J. P. 401, 52 Week. Rep. 402, 90 L. T. N. S. 531, 20 Times L. R. 427, 6 W. C. C. 124.

But the Scotch court of session has held that profits made in business undertaken by the workman after his injury are not to be taken as the measure of the workman's earning capacity. *Patterson v. Moore* [1910] S. C. 29, 47 Scot. L. R. 30, 3 B. W. C. C. 541. The Lord President said that the man's wage-earning capacity is a perfectly different thing from the question of what profit he makes in a business, and added: "You cannot get at the man's wage-earning capacity by finding out what he is making in business." W. M. G.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM T. SULLIVAN, Employee.

STRATHMORE PAPER COMPANY, Employer.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurer, Appt.

(218 Mass. 141, 105 N. E. 463.)

#### Master and servant — workmen's compensation act — incapacity for labor.

The time during which an employee who loses an arm in his employment is unable to obtain work because of the injury is within the operation of a statute providing weekly compensation while the incapacity for work resulting from the injury is total, although he is able to perform labor in much less time after the accident if he could procure it.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(May 25, 1914.)

**Note.**—As to inability to get work because of injury, as "incapacity for work," within the meaning of the workmen's compensation act, see annotation following this case, post, 380.  
L.R.A.1916A.

**A**PPEAL by insurer from a decree of the Superior Court for Suffolk County affirming a decision of the Industrial Accident Board awarding the employee compensation for a total incapacity for work during the time he was unable to procure it. Affirmed.

The facts are stated in the opinion.

Mr. Edward C. Stone, with Messrs. Sawyer, Hardy, & Stone, for appellant: The physical incapacity for work was not total.

*Ball v. William Hunt & Sons*, 5 B. W. C. C. 459 [1912] A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550; *McDonald v. Wilson's & C. Coal Co.* 5 B. W. C. C. 478, [1912] A. C. 513, 81 L. J. P. C. N. S. 188, 106 L. T. N. S. 905, 28 Times L. R. 431, 56 Sol. Jo. 550, [1912] S. C. (H. L.) 74, 49 Scot. L. R. 708.

Mr. James H. Mulcare, for appellee:

The act is a scheme to give compensation for inability to earn wages.

*Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60.

The words "incapacity for work" in § 9 of the statute, which contains the provisions for payment of compensation for injuries, are to be construed in their fairest sense and to be given their broadest scope and effect.

Opinion of Justices, 22 Pick. 571; *Re Kilby Bank*, 23 Pick. 93.

The words "incapacity for work" have been held to mean inability to obtain work.

*Ball v. William Hunt & Sons* [1912] A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459; *Com. v. Kimball*, 24 Pick. 366, 36 Cyc. 1108.

**Sheldon, J.**, delivered the opinion of the court:

This employee sustained an injury which necessitated the amputation of his right arm, and for which it is admitted that he was entitled to compensation. But the insurer contends that on May 31st following the accident he was physically able to go to work, and that for this reason his right to be compensated for an incapacity for work ceased on that day, regardless of the question whether he was or was not able to procure work. The facts found by the committee of arbitration, and, on review, by the Industrial Accident Board, are that from May 31st to October 25th he did not work, that he diligently endeavored to secure employment and was unable to obtain work because of the loss of his arm, but that on May 31st he was capable of doing the work which he finally procured, or any work which a one-armed man could ordinarily perform. Upon these facts, and as an inference therefrom, it further was found that he was in fact unable to obtain any work at which he could earn wages during the period from May 31st to October 25th, and he was awarded compensation for a total incapacity for work during that time.

Our statute provides for a weekly compensation while "the incapacity for work resulting from the injury is total." Stat. 1911, chap. 751, pt. 2, § 9. The expression "incapacity for work" was taken from the English workmen's compensation act of 1906, in which it was provided that the amount of compensation to be paid "where total or partial incapacity for work" resulted from the injury should be certain weekly payments. Accordingly decisions of the English courts fixing the meaning there to be given to these words are of weight. *McNicol's Case*, 215 Mass. 499, 501, ante, 306, 102 N. E. 697, 4 N. C. C. A. 522.

The same words were used in an earlier English statute; and it was held by the court of appeal in *Clark v. Gaslight & Coke Co.* 21 Times L. R. 184, that the object of the act was to give compensation for an inability to earn wages, and that if an injured employee after repeated efforts could not get an opportunity to earn wages, a finding that his earning power was gone and therefore that he was under an "incapacity L.R.A.1916A.

for work" was warranted, although he had a physical capacity to work and earn money. The same principle has been affirmed in other English decisions, that an inability to obtain work resulting directly from a personal injury is an incapacity for work within the meaning of this act, although a like inability resulting from some other cause, such as an altered condition of the labor market, would not be so. The inability to get work is evidence tending to show an incapacity for work, although it will not always be conclusive. *Radeliffe v. Pacific Steam Nav. Co.* [1910] 1 K. B. 685, 79 L. J. K. B. N. S. 429, 102 L. T. N. S. 206, 26 Times L. R. 319, 54 Sol. Jo. 404, 3 B. W. C. C. 185; *Cardiff Corp. v. Hall*, 4 B. W. C. C. 159 [1911] 1 K. B. 1009, 80 L. J. K. B. N. S. 644, 27 Times L. R. 339, 104 L. T. N. S. 467; *Brown v. J. I. Thornycroft & Co.* 5 B. W. C. C. 386.

This doctrine of the English courts was settled finally in two decisions of the House of Lords. *Ball v. William Hunt & Sons*, 5 B. W. C. C. 459, [1912] A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, overruling *s. c.* in the court of appeal [1911] 1 K. B. 1048, 80 L. J. K. B. N. S. 655, 104 L. T. N. S. 327, 27 Times L. R. 323, 55 Sol. Jo. 383, 4 B. W. C. C. 225, and *McDonald v. Wilson's & C. Coal Co.* 5 B. W. C. C. 478.

In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. *Gillen's Case*, 215 Mass. 96, 99, ante, 371, 102 N. E. 346. If, as in this case, the injured employee by reason of his injury is unable in spite of diligent efforts to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it, he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work. But we said in *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549, that the statute was to be construed broadly for the purpose of carrying out its manifest purpose.



The Industrial Accident Board had a right to find that the employee was totally incapacitated for work until October 25th, and to award him compensation upon that basis. The decree of the Superior Court must be affirmed.

**Annotation—Inability to get work because of injury, as “incapacity for work,” within the meaning of the workmen’s compensation act.**

As to application and effect of workmen’s compensation acts, generally, see annotation, ante, 23.

That “incapacity for work” means inability to get work because of the injury, as well as inability to perform the work because of the injury, seems to be fairly established.

The decision in *RE SULLIVAN* is supported by several other decisions of the Massachusetts court.

Thus, although a workman has a limited physical capacity to work and earn money, nevertheless a finding that he is totally “incapacitated for work” is justified where it is based upon the further finding that the workman “has endeavored to obtain, and has been unable to find, any work which the incapacity due to the injury will not prevent him from performing.” *Duprey’s Case* (1914) 219 *Mass.* 189, 106 *N. E.* 686.

And a finding of inability to secure employment because of the injury is equivalent to the finding of total incapacity for work. *Stickley’s Case* (1914) 219 *Mass.* 513, 107 *N. E.* 350.

A finding by the Industrial Accident Board that during the time in question an employee was physically unable to earn anything renders immaterial a finding that the workman did not make any effort to obtain employment. *Septimo’s Case* (1914) 219 *Mass.* 430, 107 *N. E.* 63, 7 *N. C. C. A.* 906.

In *Gorrell v. Battelle* (1914) 93 *Kan.* 370, 144 *Pac.* 244, it was held that incapacity for work within the meaning of the Kansas act means inability to perform work and also inability to secure work to do.

A number of cases under the English act have held that the employer cannot guarantee work for the workman against the fluctuations of the labor market. *Gray v. Reed* [1913] *W. C. & Ins. Rep.* (Eng.) 127, 108 *L. T. N. S.* 53, 6 *B. W. C. C.* 43; *Cardiff Corp. v. Hall* [1911] 1 *K. B.* (Eng.) 1009, 80 *L. J. K. B. N. S.* 644, 104 *L. T. N. S.* 467, 27 *Times L. R.* 339, 4 *B. W. C. C.* 159; *Clark v. Gaslight & Coke Co.* (1905) 21 *Times L. R.* (Eng.) 184, 7 *W. C. C.* 119. It is not the inability to get work because of the state of the labor market, but because of the condition of the workman due to the in-

jury. *Dobby v. Pease* (1909) 2 *B. W. C. C.* (Eng.) 370.

There is some apparent conflict in the decisions of the court of appeal upon this important question.

In *Cardiff Corp. v. Hall* [1911] 1 *K. B.* (Eng.) 1009, 80 *L. J. K. B. N. S.* 644, 104 *L. T. N. S.* 467, 27 *Times L. R.* 339, 4 *B. W. C. C.* 159, and in *Guest, Keen & Nettlefolds v. Winsper* (1911) 4 *B. W. C. C.* (Eng.) 289, the court of appeal apparently took the position that when the employer has proved that the workman is able to do work of some kind, he is entitled to have the compensation reduced, and there is no obligation resting upon the employer to show that he can get such work to do. In *Carlin v. Alexander Stephen & Sons* [1911] *S. C.* 901, 48 *Scot. L. R.* 862, 5 *B. W. C. C.* 486, where it was shown that the workman was able to do light work, and that the employers had offered him such work, Lord Salvesen said that he was of the opinion that the compensation might have been reduced on the first finding alone.

But it had previously been held by the court of appeal that where the county court judge has found that the workman was capable of doing “some light work if he could obtain it,” there was a burden upon the employer to show that there was work of that character obtainable. *Proctor v. Robinson* [1911] 1 *K. B.* (Eng.) 1004, 80 *L. J. K. B. N. S.* 641, 3 *B. W. C. C.* 41.

And in an earlier case full compensation was restored where the workman, who had injured his hand, had partially recovered and had been earning wages somewhat less than he had formerly earned, but had been discharged and was unable to secure other light work, although, as was expressly found by the county court judge, he was fully capable of doing light work which did not require the full use of his hand. *Clark v. Gaslight & Coke Co.* (1905) 21 *Times L. R.* (Eng.) 184, 7 *W. C. C.* 119.

Although some of the judges of the court of appeal found themselves able to distinguish between the cases cited above, the conflict between them is noted and emphasized by Lord Salvesen in his decision in *Carlin v. Alexander Stephen*

& Sons [1911] S. C. 901, 48 *Scot. L. R.* 862, 5 B. W. C. C. 486.

The House of Lords, however, has apparently settled the question, because they have, in unequivocal terms, laid down the proposition that "incapacity for work" may mean physical inability to do work so as to earn wages, or it may mean inability to earn wages by reason of inability to get employment, due to the belief of employers in the unfitness of the workman to perform work owing to the injuries they perceive he has sustained. *Ball v. Hunt* [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 *Times L. R.* 428, 56 *Sol. Jo.* 550, 5 B. W. C. C. 459; *Macdonald v. Wilsons & C. Coal Co.* [1912] A. C. (Eng.) 513, [1912] S. C. (H. L.) 74, 81 L. J. P. C. N. S. 188, 106 L. T. N. S. 905, 28 *Times L. R.* 431, 56 *Sol. Jo.* 550, [1912] W. N. 145, [1912] W. C. Rep. 302, 5 B. W. C. C. 478, 49 *Scot. L. R.* 708.

The House of Lords disapproved and overruled the decision in *Boag v. Lochwood Collieries* [1910] S. C. 51, 47 *Scot.*

*L. R.* 47, 3 B. W. C. C. 549, in which it was held that in a case in which there had been an award of compensation based upon the theory that the workman was able to do light work, it was not a ground for review that the employers were unable to give him suitable light work, and that he was unable to obtain light employment elsewhere.

If the workman offers to prove that he tried, and was in fact not able, to procure light work, the arbitrator must consider the evidence and act upon it, although he may consider it along with his own local knowledge of the conditions of the labor market. *Dyer v. Wilsons & C. Coal Co.* (1914) 52 *Scot. L. R.* 114, 8 B. W. C. C. 367, [1915] S. C. 199.

And it has been held that if the workman is not able to do the light work offered him, any award based upon his ability to do such light work may be reviewed. *Rex v. Templer* (1911; Div. Ct.) 132 L. T. Jo. (Eng.) 203.

W. M. G.

## MICHIGAN SUPREME COURT.

HELEN JENDRUS

v.

DETROIT STEEL PRODUCTS COMPANY  
et al., Plffs. in Certiorari.

(178 Mich. 265, 144 N. W. 563.)

### Master and servant — workmen's compensation act — refusal of employee to consent to immediate operation.

Refusal of an injured workman, a foreigner, unable to speak or understand the English language, and suffering great pain, to submit to a serious operation until fifteen or sixteen hours after it was first found necessary, is not, as matter of law, so unreasonable and persistent as to amount to a refusal of medical attention, and defeat his widow's claim for compensation under a workmen's compensation act providing compensation for injuries arising out of and in the course of the employment; nor does such conduct amount to the intentional and wilful misconduct which will defeat a right to compensation.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

(December 20, 1913.)

**Note.** — As to refusal of injured workman to have operation performed as bar to compensation under workmen's compensation act, see annotation following this case, post, 387, L.R.A.1916A.

**C**ERTIORARI to the Industrial Accident Board to review a judgment affirming the award of an Arbitration Committee in favor of claimant upon a claim by her for compensation for the death of her husband, under the workmen's compensation act. Affirmed.

The facts are stated in the opinion.

Messrs. **Beaumont, Smith, & Harris**, for plaintiffs in certiorari:

At common law, it would have been the duty of Jendrus to employ a competent surgeon and to use reasonable care in his selection.

*Stover v. Bluehill*, 51 Me. 441; *Reed v. Detroit*, 108 Mich. 224, 65 N. W. 967.

If the employee unreasonably refuses the medical attention offered by the employer, he forfeits his compensation, and the English law does not burden the employer with the duty of providing this medical attendance.

*Donnelly v. William Baird & Co.* 45 *Scot. L. R.* 394, [1908] S. C. 536, 1 B. W. C. C. 95; *Warneken v. Richard Moreland & Son*, 100 L. T. N. S. 12, [1908] W. N. 252, [1909] 1 K. B. 184, 78 L. J. K. B. N. S. 332, 25 *Times L. R.* 129, 53 *Sol. Jo.* 134, 2 B. W. C. C. 350; *Tutton v. The Majestic*, 100 L. T. N. S. 644, [1909] 2 K. B. 54, 78 L. J. K. B. N. S. 530, 25 *Times L. R.* 452, 53 *Sol. Jo.* 447, 2 B. W. C. C. 346; *Paddington Borough Council v. Stack*, 2 B. W. C. C. 402.

Mr. **William W. MacPherson** for defendant in certiorari.



Stone, J., delivered the opinion of the court:

The claimant and appellee is the widow of Joseph Jendrus, who died on February 19, 1913. Joseph Jendrus, a native of Poland, was on February 14, 1913, an employee of the appellant Detroit Steel Products Company, which was then insured under the workmen's compensation act by the appellant Michigan Workmen's Compensation Mutual Insurance Company. Joseph Jendrus was, at the date last named, also subject to the compensation act. On Friday, February 14, 1913, at about 2 o'clock in the afternoon, Jendrus, while in good health and vigor, was at work for his said employer, polishing a spring scroll, when the end of the scroll caught on a belt of a machine, and swung around and struck him violently in the abdomen. Jendrus was immediately placed on a stretcher and sent to Harper Hospital. The insurance company was notified, and its surgeon, Dr. W. H. Hutchings, reached the hospital before the ambulance arrived. He looked at Jendrus before he was taken into the hospital. Before Jendrus was taken into the ward, samples of his urine and his blood were taken, and he was then put to bed. As soon as this was done, the surgeon examined him, and found "a tenderness, very slight, almost no sign of contusion on the outside, just a little redness." This was on the right side between the ribs and the hip. This was at 2 P. M. A delay was necessary for the blood examination. At 4 o'clock Dr. Hutchings saw Jendrus again. He then complained of much pain, and there was marked muscular rigidity over the area where the blow appeared to have struck. At 8 o'clock P. M. another examination was made. The area of hardness was then spreading. The blood examination had shown no internal hemorrhage, the urine no blood, and the surgeon, with this information, diagnosed the case as that of a ruptured intestine. At this hour Jendrus's temperature was arising. The surgeon, to confirm his diagnosis, asked Drs. George McKean and Angus McLean to see the injured man. They each examined him at about 8 o'clock, and confirmed Dr. Hutchings's opinion, and they joined him in saying that an immediate operation was necessary. At this time the claimant and an elderly man were at the bedside of the patient. Jendrus spoke very little English, and Dr. Hutchings could not speak Polish. He and the man spoke German, and the doctor explained to him the necessity for an operation. Upon this subject Dr. Hutchings testified before the committee of arbitration as follows: "I told him that, if my diagnosis was correct, that without an operation he was, in my opinion, sure to die; that, if he was operated on at

that time, he had about nine chances out of ten of getting well. I thoroughly explained that the longer he delayed the operation, the so much worse it was for his chances; that, if he delayed long enough, there would be no use of operating. Dr. McLean and Dr. McKean said the same thing. I was not satisfied from the attitude of the man I talked with that he had told him what I said. I was not sure that he did. So I sent down and got one of the maids there who spoke English very well, and who is Polish also, called her in and said to her, 'I want you to tell this man what I say to you.' This was around 8 o'clock. 'You tell him that, if our diagnosis is correct, that if he is not operated on, he will surely die.' I said, 'If you are operated on now, as soon as we can, your chances of getting well are about nine out of ten; the longer you delay this, so much you take away from your chances of recovery; if you delay it until you are pretty near dead, probably an operation will do you no good.' This Polish girl explained this to the man, and he said, 'No.' I could see him shake his head. It was apparent from his general attitude that he would not have it, so I went away. . . . I went away leaving instructions, if they changed their minds, they were to call me."

While the doctors were there in consultation, the patient vomited a little fluid. Dr. McLean testified: "It was fecal in odor, but was not of a poisonous nature." Dr. McKean testified: "It was almost a fecal vomit, due to reverse acting of the peristalsis. It was just the beginning of peritonitis. . . . It was approaching the fecal vomiting time." The patient was kept quiet during the night. The next morning when Dr. Hutchings again saw him he was worse. The doctor testified: "His pulse was rapid, the whole abdomen was distended and tender, and the typical signs of advanced peritonitis; that is, he was vomiting considerable quantities of fecal matter, which by that time had become markedly fecal."

The patient would not consent in the morning to an operation. Dr. Hutchings went to attend to some other operations. Between 11:30 A. M. and 12 o'clock another physician had been called by the Jendrus family, and he testified that when he arrived Jendrus had consented to be operated upon. Dr. Hutchings testified that it was about 12:30 P. M. when he was told by the nurse that Jendrus had consented to an operation. A room was ordered prepared, and the patient was operated upon at 1:30 P. M. This was as soon as the arrangements could be made. The house staff was present and assisted. There was testimony that the vomiting had grown worse, and it had been

persistent all the morning, and the distended condition of the abdomen had developed about 9 o'clock. Because of the vomiting Dr. Hutchings directed the assistants to use nitrous oxid as the anesthetic as being less likely to produce vomiting. Just as the patient was going under the influence of the anesthetic a large quantity of fecal vomitus came up, and some of it went down in his lungs. They turned his head over in the endeavor to rid him of this. The surgeon testified that there was no way that this vomitus getting into the lungs could be avoided. Dr. Hutchings proceeded with the operation, which took about ten minutes. He made the ordinary incision and found a complete peritonitis. The intestines were so congested that he did not attempt to remove them and find the perforation. He inserted drainage in the abdomen, and began transfusing a salt solution subcutaneously. Following the operation Jendrus's condition improved. His temperature went down; the vomiting became less, but his breathing remained rapid. There was trouble about washing out his stomach. He had refused to have this done, but finally consented.

Two days after the operation pneumonia developed, and Dr. Ernest Haass was called. He found the patient suffering from aspiration, or "swallow" pneumonia. This was on Monday. The next two days the lungs solidified, and the patient died of pneumonia, in the opinion of most of the physicians. Dr. McLean, however, testified that, while he saw him but a few times, he did not think he died of pneumonia; he thought it was the peritonitis that was the cause of his death, but testified that he did not see the patient after he had pneumonia. After Jendrus's death a post mortem was performed by Dr. Sill, and it confirmed the diagnosis of the surgeon.

The lungs were found to be solidified, and Dr. Sill testified, among other things, as follows:

I think that the pneumonia process discovered was as potent a factor in causing the death as the peritonitis. I would call that what we term the immediate cause of death.

Q. Was there any way for you to determine whether or not the pneumonia was caused by inspiration of material, of vomitus?

A. Simply that it was a disseminated bronchial pneumonia. . . . The pneumonia process was still active. I mean that the inflammation was going on. I think the man died from toxemia. I hold from my post mortem findings that the pneumonia process was the most active toxic process going on at the time of his death. I form L.R.A.1916A.

that opinion from the fact that the peritonitis was beginning to localize, beginning to subside. I don't think I could say that pneumonia was sufficient to have caused death without the complicated inflammation of the peritonitis. The peritonitis and the pneumonia together were sufficient to cause death; but whether the pneumonia alone would have caused death I could not answer. . . . I think pneumonia was the immediate cause of death. If he had not had pneumonia, he would not have died when he did die, and he might have recovered from his peritonitis.

Q. Nothing certain about that, about him recovering from the peritonitis?

A. I could not swear that he would recover; no.

Q. Are you able to tell from your post mortem findings, or are you able to state, which was the greatest factor in his death production, eliminating the fact that his pneumonia came, as stated by Dr. Hutchings, from the inspiration of material vomited?

A. No; I don't think I can state that. I don't think I can state which was the greatest factor in his death, eliminating the fact that his pneumonia came from the inspiration of material vomited.

The perforation of the intestine was located at the post mortem. On separating the coils of the intestines a perforation the size of a Canadian 5-cent piece was found in the ileum,  $2\frac{1}{2}$  feet from the caput coli. None of the physicians testified that Jendrus would surely have recovered from the operation if it had been performed Friday night; but there was testimony that an early operation presented the only chance for saving his life.

After the death of Jendrus the claimant here made claim for compensation. A committee of arbitration was appointed, testimony taken, and the award was in favor of the claimant for the sum of \$10 per week for a period of 300 weeks from the 14th day of February, 1913.

Thereafter a review of this award was had, and the Industrial Accident Board affirmed it, filing an opinion and finding of facts, as follows: "In this case the deceased, Joseph Jendrus, was injured by a severe blow on the abdomen. The doctors attending the injured man diagnosed the injury as a probable rupture of the intestine, and advised an operation. The accident occurred about 1 o'clock in the afternoon on February 14th. At about 8 or 8:30 in the evening the doctors sought to operate on the injured man. It appears that he could not talk English, and communication was had with him through an interpreter. The injured man shook his



head, indicating a refusal to be operated on. The matter of an operation was again brought up by the doctors on the following morning, February 15th. Jendrus, at that time, refused to submit to the operation, but consented at about 11:30 A. M. The operation was performed about 1.30 P. M. on February 15th. It seems that during the operation the patient vomited, and the vomit was drawn into the lungs, causing pneumonia, and resulting in his death a few days later. The operation disclosed a rupture of the intestines which was not sutured, and the post mortem examination showed the same to be in process of healing at the time of death. All communication with the deceased after the injury was through an interpreter. The Board is of the opinion that the refusal to be operated on when first requested, and the further action of deceased in delaying consent to the operation until nearly noon on the day following the accident, was not so unreasonable and persistent as to defeat the claim for compensation in this case. He did submit to the operation after being convinced that it was absolutely necessary. It seems that nearly two hours elapsed from the time he gave his consent until the operation was performed. It is by no means certain that an earlier operation would have saved his life, nor is it certain that the operation actually performed would not have resulted in his recovery were it not for the fact that he vomited while under the anesthetic, and inhaled some of the vomit, causing pneumonia. It seems clear that the operation was not too late to remedy the abdominal injury caused by the accident. The vomiting and resulting pneumonia came as an incident to the operation. The fact that the deceased was unable to speak English and was unaccustomed to the ways of this country should be given some weight. The judgment and decision of the arbitration committee is affirmed."

There was a motion to amend the findings, which was refused except in one instance, to which action there was no exception or error assigned, and the matter of refusal to amend is not before us.

The case is here upon certiorari to review the action of the Industrial Accident Board.

The following grounds of error are assigned by appellants in the affidavit for the writ of certiorari:

(a) "The Industrial Accident Board erred in affirming the said judgment and decision of the said arbitration committee.

(b) "The Industrial Accident Board erred in deciding that the refusal of said Joseph Jendrus to be operated on when first requested, and further action of the deceased in delaying consent to the operation, L.R.A.1916A.

was not so unreasonable and persistent as to defeat the claim for compensation.

(c) "The said Industrial Accident Board erred in holding that the refusal of the said Joseph Jendrus to be operated on was not so unreasonable as to defeat the claim for compensation.

(d) "Said Industrial Accident Board erred in deciding that the refusal of the said Joseph Jendrus was not so persistent as to defeat the claim for compensation in that the refusal to submit to an operation, if unreasonable, need not be persistent to defeat the claim for compensation.

(e) "Said Industrial Accident Board likewise erred in their conclusion of law that the said refusal was not so persistent as to defeat the claim for compensation in that, as a matter of law, the said refusal need not be persistent to defeat said claim.

(f) "Said Industrial Accident Board erred in its conclusion of law that the said refusal was not unreasonable.

(g) "That said Industrial Accident Board erred in their decision, because it appears from the testimony that the said Joseph Jendrus did not come to his death as a result of the said injury for which compensation was claimed, but he came to his death by reason of his refusal to permit the medical attention offered him by said respondents, Michigan Workmen's Compensation Mutual Insurance Company and the Detroit Steel Products Company.

(h) "The said Industrial Accident Board erred in holding, as a matter of law, that the death of the said deceased was not a result of his intentional and wilful misconduct.

(i) "The Industrial Accident Board erred in holding, as a matter of law, that the claimant was entitled to compensation as widow of the said Joseph Jendrus; he having refused to consent to the medical attendance offered by the said employer, the Detroit Steel Products Company, and the Michigan Workmen's Compensation Mutual Insurance Company, petitioners herein."

Section 12 of part 3 of the act (act No. 10, Public Acts of 1912) provides that the finding of fact made by the said Industrial Accident Board, acting within its powers, shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law involved in any final determination of said Industrial Accident Board. No question is raised in this case involving the validity or constitutionality of the act in question. No claim of fraud is here presented.

The appellants state in their brief that the questions involved are: (1) Did the injury arise out of and in the course of the

employment? (2) Was the employee guilty of intentional misconduct?

It is said that these questions are closely related, since it is clear that, if the employee had been guilty of intentional and wilful misconduct, he could not be acting within the course of his employment. We quote from appellants' brief as follows:

"Manifestly, the original injury—the striking of the spring against the abdomen of Jendrus—arose in the course of the employment, and arose out of the employment, and there is no showing that it was caused by the wilful misconduct of Jendrus. But the claim here is for compensation by reason of the death of Jendrus. The question then is, did the death occur from that injury, or was it caused by some other accident, act, or injury? . . . Here Jendrus had entered into an agreement by which he had undertaken to accept from his employer reasonable medical treatment and hospital services. The employer had undertaken that for a limited period of time it would furnish this service. That agreement was offered to the employee as a part consideration for his yielding up his right of action at common law. But it rests as well upon another theory, which is that the employer, by reason of the fact that it undertook to pay the injured employee a percentage of his earnings during the period of his disability, should have the right, as it was its duty, to furnish the medical attendance to that employee in order to minimize the injury and the consequent compensation."

"When, therefore, Jendrus refused the medical attendance offered by his employer, he refused that which the employer had undertaken to give him, and he refused a service that it was important for the employer to render by reason of the relation which it bore to the compensation that the employer must pay for disability or death. . . . The workmen's compensation statute specifically provides that the injury must arise out of the employment, and specifically negatives a recovery where there is intentional and wilful misconduct. It is true that the statute disregards negligence; but there still must remain, before there can be a recovery, a showing that the injury did result from an accident arising out of the employment, and not from any other cause."

"It would be a harsh rule that bound an employee who had been injured to accept in all cases the dictum of a surgeon who advises an operation. Manifestly the employee cannot be called upon at all times and under all circumstances to place himself absolutely in the hands of the employer's surgeon; but, where there is no dispute amongst his medical advisers, and the

course suggested presents the only opportunity for the saving of the life, we insist that that refusal is a new and controlling cause for the injury for which recovery is sought."

Counsel for appellants call attention to the English act which provides, as ours does, for the payment for injuries arising out of and in the course of the employment, but that that act does not provide for medical care by the employer; and it is urged that in Michigan, if the employee refuses the reasonable medical services tendered by the employer, he is refusing compensation, and should not be permitted to compel the employer to pay the money compensation, while, at the same time, he is refusing to accept the medical compensation. It is urged that under the English decisions the rule has been universally laid down that, if the employee unreasonably refuses to accept the medical attention offered by the employer, he forfeits his compensation. And our attention has been called to the following English cases: *Donnelly v. William Baird & Co.* (Ct. of Sess.) 45 Scot. L. R. 394, 1 B. W. C. C. 95.

In that case a workman, in the course of his employment, had suffered injury to his left hand, in respect of which he was receiving compensation. On application by the employers to stop the payment of compensation on the ground that the continued incapacity for work resulted from the workman refusing to undergo surgical treatment, the sheriff's substitute found that the operations suggested by the doctors were simple or minor operations, not attended with appreciable risk or serious pain, likely, if submitted to, to restore the workman's capacity for work, and that the workman was of good constitution and sound general health; he thereupon ended the payment of compensation. The court of sessions, two justices dissenting, held that, upon the findings of the sheriff's substitute, his decision was right.

In the course of his opinion, Lord Justice Clerk said: "The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is an unreasonable refusal is necessarily a question of degree. For it cannot be maintained that no matter what be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of *Dowds v. Bennie*, 40 Scot. L. R. 219, 5 Sc. Sess. Cas. 5th series, 268, 10 Scot. L. T. 439, when he laid it down



that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under penalty, if he refuses, or forfeiture of his right to a weekly payment—e. g., in the case where a serious surgical operation is proposed with more or less probability of a successful cure. On the other hand, I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering,—such an operation as a man of ordinarily manly character would undergo for his own good; in a case where no question of compensation due by another existed. In preparing this opinion I find that I have used almost the terms which are to be found in the case of *Anderson v. Baird*, 40 Scot. L. R. 263, 5 Sc. Sess. Cas. 5th series, 373. These two cases which I have referred to seem to me to practically rule this case.”

Lord McLaren said: “There is, of course, no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. In order to test the principle of decision I will suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument maker, for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled; but he is advised that by breaking the bone at the old fracture and resetting it the use of his hand will be completely restored. I am supposing the case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the compensation act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment, and that he was not entitled to further compensation. Passing to the other extreme, it is easy to figure a case of internal injury where an operation if successful would restore the

sufferer to health, but where the surgeon was bound to admit that the operation was attended with danger. In such a case it would be generally admitted that there was not only a legal but a moral right of election on the part of the injured person; and, if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation. In view of the great diversity of cases raising this question, I can see no general principle except this: that if the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power.”

Our attention is also directed to the case of *Warneken v. Richard Moreland & Son*, (C. A. Eng. 1908) 100 L. T. N. S. 12, 2 B. W. C. C. 350. There it was held that, where a workman was injured by an accident in respect of which he was otherwise entitled to receive compensation, and refused to submit to a surgical operation of a simple character, involving no serious risk to life or health, and which, according to the unanimous professional evidence, offered a reasonable prospect of the removal of the incapacity from which he suffered, that under those circumstances he had debarred himself from any right to claim further compensation under the act for his continued disability, as such continuance was not attributable to the original accident, but to his unreasonable refusal to avail himself of surgical treatment. In that case the claimant had injured his foot and had had two toes removed. He still suffered pain, and the X-rays showed that a piece of bone was loose in the big toe. The doctors advised an operation; but the man refused. Moulton, L. J., said: “To hold the contrary would lead to this result, that a workman who had an injury, however small, might refuse to allow it to be dressed, and let a trivial burn, say, become a sloughing sore, and lead to partial or total incapacity. . . . The distinction is between being reasonable and not being reasonable.”

This case was followed by the case of

*Tutton v. The Majestic* (C. A. 1909) 100 L. T. 644, 2 B. W. C. C. 346. It was there held that a workman injured by an accident arising out of and in the course of his employment within the meaning of the act, who refuses, on the advice of his own doctor, to submit to the surgical operation which, in the opinion of such medical man, involved some risk to his life, is not acting unreasonably in such refusal, and is not thereby precluded from claiming compensation from his employer under the act in respect of his continued disability to work. There the court said: "The test is not really whether on the balance of medical opinion the operation is one which might reasonably be performed. The test is whether the workman, in refusing to undergo the surgical operation, acted unreasonably. I altogether decline to say that, in a case of an operation of this kind, a workman can be said to act unreasonably in following the advice of an unimpeached and competent doctor, even though on the balance of medical evidence given at a subsequent date the learned county court judge might hold that the operation was in its nature one which might reasonably and properly be performed." Here the applicant was a sailor on board the steamship *Majestic*, and met with an accident which resulted in double rupture. He went to the hospital at Southampton, where the doctor advised an operation. The applicant then consulted another surgeon, who advised him not to undergo an operation, as he was suffering from Bright's disease of the kidneys, which would, in his opinion, render it dangerous for him to have an anesthetic administered; the physician saying that it would be barbarous for him to undergo an operation without an anesthetic. With kidney disease an anesthetic would be a risk to his life.

The appellee has called our attention to the case of *Marshall v. Orient Steam Nav. Co.* [1910] 1 K. B. 79, 79 L. J. K. B. N. S. 204, [1909] W. N. 225, 101 L. T. N. S. 584, 26 Times L. R. 70, 54 Sol. Jo. 50, 3 B. W. C. C. 15, to the effect that, where an injured party refuses to undergo a surgical operation, the employer has the burden of showing that the operation would have accomplished its purpose.

Attention is also called by appellee to the

case of *Hay's Wharf v. Brown*, 3 B. W. C. C. 84, to the effect that the burden is upon the employer to show that the refusal of the workman was unreasonable.

In none of the cases cited by appellants' counsel was the operation anything more than a minor operation for a trifling injury. We think the cases clearly distinguishable from the instant case, which involved a major operation of a serious nature. None of the testimony in the case goes to the length of showing that Jendrus's life would have been saved had the operation been submitted to at 8 o'clock on the evening of February 14th, which was the first time that Dr. Hutchings had reached the conclusion that an operation was necessary. Peritonitis had already set in, and the vomiting had commenced, and vomitus of a fecal nature was then being expelled. That it was the injury which caused the peritonitis is not questioned; that it was the peritonitis which caused the vomiting of fecal matter is not questioned; that it was the taking of fecal matter into the lungs which caused the pneumonia is claimed by all the surgeons who testified. There is testimony that he might have recovered without any operation, although that result could not have been reasonably expected.

Under all the circumstances of the case, including the fact that Jendrus was a foreigner, unable to speak or understand the English language, that he was suffering great pain on the evening of the 14th, that he was unacquainted with his surroundings, and that he did consent to, and did submit to, an operation within fifteen or sixteen hours after it was first found necessary, in the judgment of the surgeons, we cannot hold, as matter of law, that the conduct of Jendrus was so unreasonable and persistent as to defeat the claim for compensation by his widow. Neither can we hold that Jendrus, by his conduct in the premises in causing a delay in the operation, was guilty of intentional and wilful misconduct. We cannot say, as matter of law, that the Industrial Accident Board erred in its conclusions of law in affirming the action of the committee on arbitration. No other questions of law are presented by the record.

The judgment and decision of the said Board is therefore affirmed, with costs against appellants.

### **Annotation—Refusal of injured workman to have operation performed as bar to compensation under workmen's compensation act.**

As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

The courts very generally agree with L.R.A.1916A.

**JENDRUS v. DETROIT STEEL PRODUCTS CO.** in holding that whether or not a workman who has been injured should submit to an operation in order to avoid se-



rious consequences of the injury, is a question of fact, dependent upon the varying circumstances of the individual case.

It has been stated by the Massachusetts court that if a workman is not to be subjected to unusual risks and danger arising from the anesthetic to be employed, or from the nature of the proposed operation, it is his duty to submit to it if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain. *Floccher v. Fidelity & Deposit Co.* (1915) — **Mass.** —, 108 N. E. 1032. In the same case it was held that it would be unreasonable to require an injured workman to submit to an operation upon his hand where, according to the expert testimony, it would be "pretty close to being permanently incapacitated for use even after this operation," and there was doubt as to the time within which some uncertain and indeterminate degree of benefit reasonably might be expected.

The New Jersey court has held that the refusal of an employee to submit to an operation cannot be said to be unreasonable where it appears that a risk of life is involved, although such risk is very slight. *McNally v. Hudson & M. R. Co.* (1915) — **N. J. L.** —, 95 Atl. 122 (peril to life was about 48 chances in 23,000).

And the same court has also held that it is error for the trial court to make an award as for temporary disability upon the theory that the injury may be cured by an operation, and that it is the duty of the employee to undergo such operation. *Feldman v. Braunstein* (1915) — **N. J. L.** —, 93 Atl. 679; *McNally v. Hudson & M. R. Co.* (**N. J.**) *supra*.

Under the English act the cases very generally hold that a workman will be denied compensation where he unreasonably refuses to undergo an operation of a minor character which would, in the opinion of medical men, restore his earning capacity. *Donnelly v. William Baird & Co.* [1908] S. C. (**Scot.**) 536, 45 **Scot. L. R.** 394, 1 B. W. C. C. 95 (operation of a simple character, not attended with appreciable risk or serious pain, and likely to restore to the workman, in a large measure or altogether, the use of his injured hand); *Anderson v. Baird* (1903) 5 Se. Sess. Cas. 5th series, 373, 40 **Scot. L. R.** 263 (simple operation not attended with serious risk or pain); *Warneken v. Richard Moreland & Son* [1909] 1 K. B. (**Eng.**) 184 [1908] W. N. 252, 25 **Times L. R.** 129, L.R.A.1916A.

53 **Sol Jo.** 134, 78 L. J. K. B. N. S. 332, 100 L. T. N. S. 12 2 B. W. C. C. 350 (operation not serious, and likely to remove incapacity); *Paddington Borough Council v. Stack* (1909) 2 B. W. C. C. (**Eng.**) 402 (operation trivial and advised by workman's own doctor); *Walsh v. Lock & Co.* (1914) 110 L. T. N. S. (**Eng.**) 452, [1914] W. C. & Ins. Rep. 95, 7 B. W. C. C. 117 (operation not attended with much pain or risk, and would in all probability restore workman's capacity).

And a workman may be found to be unreasonable in refusing to undergo an operation although two doctors said that it would not remove the incapacity, where three other doctors gave as their opinion that the operation would remove the incapacity, and the advice against having the operation performed was based solely upon the ground that it would not be successful, and not upon the ground of the risk or pain involved in having the operation performed. *O'Neill v. John Brown & Co.* [1913] S. C. 653, [1913] W. C. & Ins. Rep. 235, 50 **Scot. L. R.** 450, 6 B. W. C. C. 428.

But compensation will not be denied because of the workman's refusal to submit to a serious operation. *Rothwell v. Davies* (1903) 19 **Times L. R.** (**Eng.**) 423 (operation would be attended with a certain amount of risk).

Nor will compensation be refused upon the ground of the workman's refusal to have an operation performed, where it is questionable whether the operation would benefit him. *Hawkes v. Coles* (1910) 3 B. W. C. C. (**Eng.**) 163; *Marshall v. Orient Steam Nav. Co.* [1910] 1 K. B. (**Eng.**) 79, 79 L. J. K. B. N. S. 204, [1909] W. N. 225, 101 L. T. N. S. 584, 26 **Times L. R.** 70, 54 **Sol Jo.** 50, 3 B. W. C. C. 15; *Braithwaite v. Cox* (1911) 5 B. W. C. C. (**Eng.**) 77.

Nor will a workman be compelled to submit to an operation on the peril of losing his right to compensation, where his own doctor advises against it. *Sweeney v. Pumpherton Oil Co.* (1903) 5 Se. Sess. Cas. 5th series, 972, 40 **Scot. L. R.** 731, 11 **Scot. L. T.** 279; *Tutton v. The Majestic* [1909] 2 K. B. (**Eng.**) 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 **Times L. R.** 452, 53 **Sol Jo.** 447, 2 B. W. C. C. 346; *Moss v. Akers* (1911) 4 B. W. C. C. (**Eng.**) 294.

A workman cannot be claimed to be unreasonable in refusing to undergo an operation where there is no evidence that the operation would lessen the amount of compensation payable by the employers. *Molamphy v. Sheridan* [1914] W.

C. & Ins. Rep. 20, 47 *Ir. Law Times*, 250, 7 B. W. C. C. 957.

Ordinarily the question whether the refusal to permit an operation is unreasonable depends upon the facts of each case. *Ruabon Coal Co. v. Thomas* (1909) 3 B. W. C. C. (*Eng.*) 32; *Hay's Wharf v. Brown* (1909) 3 B. W. C. C. (*Eng.*) 84; *Burgess & Co. v. Jewell* (1911) 4 B. W. C. C. (*Eng.*) 145; *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. (*Eng.*) 51, 3 B. R. C. 62, 78 L. J. K. B. N. S.

528, 100 L. T. N. S. 740, 25 *Times L. R.* 451, 53 *Sol. Jo.* 430; *Dolan v. Ward* [1915] W. C. & Ins. Rep. (*Eng.*) 274, 8 B. W. C. C. 514.

The remedy of the employer, based upon the refusal of the workman to have an operation performed, lies in an application to have the award varied, and not in an appeal from the award. *O'Neill v. Robner* (1908) 42 *Ir. Law Times*, 3, 2 B. W. C. C. 334. W. M. G.

## KENTUCKY COURT OF APPEALS.

KENTUCKY STATE JOURNAL COMPANY, Appt.,  
v.

WORKMEN'S COMPENSATION BOARD.

(161 Ky. 562, 170 S. W. 1166.)

### Constitutional law — waiver of rights.

1. An employee may, by contract, waive the benefit of a constitutional provision depriving the general assembly of the power to limit the amount of recovery for personal injuries.

*For other cases, see Contracts, III. in Dig. 1-52 N. S.*

### Master and servant — workmen's compensation act — limiting recovery — constitutionality.

2. A provision in a workmen's compensation act that if an employee elects not to accept the provisions of the act he cannot recover of the employer if the injury was caused or contributed to by the negligence of a fellow servant, or was due to any of the ordinary hazards of the employment, or defect in appliances or place of work, if he knew, or could have known, of them by the exercise of ordinary care, or they were not known or could not have been discovered by the employer by the exercise of such care, nor in the event that his own negligence contributed to the injury, violates a constitutional provision that the general assembly shall have no power to limit the amount of recovery for injury.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — party plaintiff — distribution of funds.

3. A provision of a workmen's compensation act limiting the distribution of a recovery for the death of an employee to those dependent on him, and providing that, in the absence of descendants, the Compensation Board shall have the sole right of action for the death, and shall cover the recovery, after paying medical and funeral

**Note.** — As to application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to constitutionality of workmen's compensation acts, see annotation, post, 409. L.R.A.1916A.

expenses, into the fund for the benefit of the class to which the employee belongs, violates a constitutional provision giving a right to recover for death in an action brought by the personal representative of decedent.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — provision of compensation — police power.

4. The regulation of the management of the industries of the state so as to provide compensation for injured employees is within the police power.

*For other cases, see Constitutional Law, II. c, 4, c, in Dig. 1-52 N. S.*

### On Petition for Rehearing.

### Same — compulsion upon employer — constitutionality.

5. No constitutional right of an employer is infringed by requiring him to accept the provisions of a workmen's compensation act under which he must contribute to a fund for the reimbursement of injured employees under penalty of being deprived of the defenses of fellow service, assumption of risk, and contributory negligence.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(*Hobson, Ch. J., and Miller and Lassing, JJ., dissent.*)

(December 11, 1914.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Franklin County overruling a demurrer to a petition filed to compel defendant to fill out and surrender certain blanks furnished by the Workmen's Compensation Board to it for the purpose of bringing it under the provisions of the compensation act. Reversed.

The facts are stated in the opinion.

Messrs. Charles Carroll and Pratt Dale, for appellant:

The act is in violation of §§ 54 and 241 of the Kentucky Constitution.

*Union Cent. L. Ins. Co. v. Spinks*, 119 Ky 261, 69 L.R.A. 264, 83 S. W. 615, 84 S. W. 1160, 7 Ann. Cas. 913; *Continental Casualty Co. v. Harrod*, 30 Ky. L. Rep. 1117, 100 S.



W. 262; *Clarey v. Union Cent. L. Ins. Co.* 143 Ky. 542, 33 L.R.A.(N.S.) 881, 136 S. W. 1014; *Travelers' Ins. Co. v. Henderson Cotton Mills*, 120 Ky. 218, 117 Am. St. Rep. 585, 85 S. W. 1090, 9 Ann. Cas. 162; *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281.

The act is compulsory.

*Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Ohio Workmen's Ins. Act*, § 21-2; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

The act confers upon the Workmen's Compensation Board judicial powers, contrary to §§ 109 and 135 of the Constitution.

*Pratt v. Breckinridge*, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405; *Com. v. Jones*, 10 Bush, 725; *Burkett v. McCarty*, 10 Bush, 758; *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 425; *Fitch v. Manitow County*, 133 Mich. 178, 94 N. W. 952; *Shell v. Asher*, 31 Ky. L. Rep. 566, 102 S. W. 879; *Lawson*, Contr. 2d ed. § 316, pp. 363-365.

Messrs. **Brown & Nuckols**, also for appellant:

The act is not a valid exercise of the police power of the state.

*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

It takes away all right of action for death resulting from negligence or wrongful act.

*Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281; *Sturges v. Sturges*, 126 Ky. 80, 12 L.R.A.(N.S.) 1014, 102 S. W. 884.

Mr. **Elmer C. Underwood**, amicus curiae:

The act being unconstitutional in its essential features, the entire act is therefore invalid.

*Illinois C. R. Co. v. Com.* 154 Ky. 332, 157 S. W. 687.

The act is compulsory in that employers who do not accept it are deprived of the defenses of fellow servant, assumed risk, and contributory negligence, and the employee who does not accept it can recover in the single instance where the injury is caused by the master's direct negligence.

1 *Boyd*, *Workmen's Compensation*, § 169; *Doe ex dem. Gaines v. Buford*, 1 Dana, 481.

The contract provided for in the act, being repugnant to §§ 54 and 241 of the Constitution, will not be enforced by the courts.

*Pratt v. Breckinridge*, 112 Ky. 16, 65 S. W. 136, 66 S. W. 405; *Hudnall v. Watts* L.R.A.1916A.

*Steel & I. Syndicate*, 20 Ky. L. Rep. 1211, 49 S. W. 21; *Kentucky Coal Min. Co. v. Mattingly*, 133 Ky. 526, 118 S. W. 350.

The legislature cannot penalize the enjoyment of constitutional rights.

*Byers v. Meridian Printing Co.* 84 Ohio St. 408, 38 L.R.A.(N.S.) 913, 95 N. E. 917; *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731.

In order to benefit employees injured by their own negligence, or employers sustaining a loss as the result of their own negligence, the legislature cannot take from the careful employee or the careful employer.

*Scuffletown Fence Co. v. McAllister*, 12 Bush, 312; *Hancock Stock & Fence Law Co. v. Adams*, 87 Ky. 417, 9 S. W. 246; *Fitzpatrick v. Warden*, 157 Ky. 95, 162 S. W. 550; *Chesapeake Stone Co. v. Moreland*, 126 Ky. 667, 16 L.R.A.(N.S.) 479, 104 S. W. 762.

The legislature cannot abolish § 241 of the Constitution by saying that no act is a "negligent" act or a "wrongful" act unless done by the master himself.

*Howard v. Hunter*, 126 Ky. 685, 104 S. W. 723; *Linck v. Louisville & N. R. Co.* 107 Ky. 370, 54 S. W. 184; *Passamanek v. Louisville R. Co.* 98 Ky. 195, 32 S. W. 620, 11 Am. Neg. Cas. 612; *East Tennessee Teleph. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171.

The defenses of fellow servant and contributory negligence have been construed to be appurtenant to Kentucky Constitution, § 241.

*Passamanek v. Louisville R. Co.* 98 Ky. 195, 32 S. W. 620, 11 Am. Neg. Cas. 612; *Clark v. Louisville & N. R. Co.* 101 Ky. 34, 36 L.R.A. 123, 39 S. W. 840, 2 Am. Neg. Rep. 360; *Toner v. South Covington & C. Street R. Co.* 109 Ky. 41, 58 S. W. 439; *Smith v. National Coal & I. Co.* 135 Ky. 671, 117 S. W. 280; *Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 141 Ky. 249, 47 L.R.A.(N.S.) 909, 132 S. W. 569; *Louisville R. Co. v. Raymond* (Louisville R. Co. v. Taylor) 135 Ky. 738, 27 L.R.A.(N.S.) 176, 123 S. W. 281; *Linck v. Louisville & N. R. Co.* 107 Ky. 370, 54 S. W. 184.

Under § 241 of the Constitution, contributory negligence cannot defeat a recovery unless it be such that, but for it, the death would not have occurred.

*Cincinnati, N. O. & T. P. R. Co. v. Lovell*, 141 Ky. 249, 47 L.R.A.(N.S.) 909, 123 S. W. 569.

There can be no liability without fault.

*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Campbellsville v. Odewalt*, 24 Ky. L. Rep. 1739, 60 L.R.A. 723, 72 S. W. 314.

The act violates § 60 of the Kentucky Constitution in that it creates a system of jurisprudence taking effect upon an authority other than the general assembly.

*Western & S. L. Ins. Co. v. Com.* 133 Ky. 292, 117 S. W. 376; *Columbia Trust Co. v. Lincoln Institute*, 138 Ky. 804, 29 L.R.A. (N.S.) 53, 129 S. W. 113.

The act violates the 14th Amendment in that it denies due process of law to both employer and employee, and in that it gives the same protection to the careless employer and the careless employee that it gives to the careful employer and the careful employee.

*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Campbellsville v. Odewalt*, 24 Ky. L. Rep. 1739, 60 L.R.A. 723, 72 S. W. 314.

Messrs. **James Garnett**, Attorney General, and **Robert T. Caldwell**, Assistant Attorney General, for appellee:

The title of the compensation act is sufficient.

*Thompson v. Com.* 159 Ky. 8, 166 S. W. 623.

The legislature has not limited recoveries.

*Murphy v. Com.* 1 Met. (Ky.) 365; *Taylor v. Com.* 9 Ky. L. Rep. 316; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Deibekis v. Link-Belt Co.* 261 Ill. 465, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Mathison v. Minneapolis Street R. Co.* 126 Minn. 286, L.R.A.—, 148 N. W. 71, 5 N. C. C. A. 871; *Hawkins v. Bleakley*, 220 Fed. 378.

Mr. **Otto Wolff**, also for appellee:

Section 7 of the Constitution is not violated.

*Mc' Cord v. Johnson*, 4 Bibb, 531; *Ewing v. Directors of Penitentiary*, Hardin (Ky.) 6; *Wells v. Caldwell*, 1 A. K. Marsh. 441; *Harrison v. Chiles*, 3 Litt. 195; *Harris v. Wood*, 6 T. B. Mon. 641; *Murry v. Askew*, 6 J. J. Marsh. 27; *Wills v. Lochnane*, 9 Bush, 547.

The act is an exercise of the police power.

*Silva v. Newport*, 150 Ky. 781, 42 L.R.A. (N.S.) 1060, 150 S. W. 1024, Ann. Cas. 1914D, 613.

The act does not affect the right to sue and recover for wrongful act, and the definition of actionable negligence is variable by the legislature and the courts, and is L.R.A.1916A.

different in state and Federal courts sitting in the same territory.

*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, 37 L. ed. 781, 13 Sup. Ct. Rep. 914.

The action of the Board is under the supervision of the courts.

*Board of Prison Comrs. v. De Moss*, 157 Ky. 289, 163 S. W. 183; *Wilson v. Com.* 141 Ky. 341, 132 S. W. 557.

**Dorsey**, Special Judge, delivered the opinion of the court:

This case was brought to this court by appeal from a judgment of the Franklin circuit court to test the constitutionality of an act generally known as the workmen's compensation act, passed by the legislature and approved by the governor, March 21, 1914 (Laws 1914, chap. 73). By the provisions of this act, a board of commissioners is created, composed of the attorney general, the commissioner of insurance, and the commissioner of agriculture, labor, and statistics, and to be known as the "Workmen's Compensation Board." This act creates a workmen's compensation fund, which is maintained by the various classes of employers mentioned in the act, and such other employers who, together with their employees, shall apply for the benefits and protection of the act. This fund is created by fixing a rate or premium, during the first year, of not to exceed \$1.25 on each \$100 of the gross annual pay roll of each employer in any class of employers coming within the purview of the act. The Compensation Board has charge of this fund, and may increase the rate if deemed necessary. All persons, firms, and corporations regularly employing six or more persons for profit for the purpose of carrying on the class of business designated in the act in which such person, firm, or corporation is engaged are employers. And persons in the service of such employers, for the purpose of carrying on such class of business, are employees within the meaning of the act. It is made the duty of such employers to report to the Board the place of their business, the number of their employees, the amount of their pay roll, and such other information desired by the Board, by filling out blanks furnished by the Board, and returning the same to the Board. These blankets were furnished by the Board to the appellant, the State Journal Company, who was the defendant in the court below. But the appellant refused to fill out or return said blanks, and further refused to furnish the Board with any information touching the place of its business, the amount of its pay roll, the number of men in its service, or anything else. Whereupon the appellee brought this suit in the form of a man-



datory injunction to compel the appellant to fill out and return the blanks containing such information as was therein mentioned. The appellant (defendant) demurred to this petition. This demurrer involves the constitutionality of the act. The court below entered a judgment overruling the demurrer, and directed appellant to file and make the report required, from which the appellant appealed.

This act is of too great length to be embraced in this opinion. But the storm center of the fight gathers around §§ 29, 30, 31, 32, and 34, which sections read as follows:

"Section 29. It shall be lawful for any employee subject to this act, including persons under twenty-one years of age to contract with any employer subject to this act who elects to pay the premiums herein provided to be paid into said workmen's compensation fund, to accept the compensation provided to be paid to injured employees and the dependents of those killed, and to accept the benefits conferred on employees by this act, in lieu of any cause of action which he might have, if injured, or that his representative might have if he was thereafter killed through the negligence of his agents, servants, officers or employees, and to waive all causes of action against such employer conferred by the Constitution or statutes of this state or by the common law for his injury or death, occurring through the negligence of the employer or his agents and such contract shall be binding upon the employer and upon the employee and upon his heirs, personal representatives, and all persons claiming under or through him.

"Section 30. Such a contract between an employee and his employer shall be conclusively presumed to have been made in every case where an employer has elected to pay into the workmen's compensation fund, if said employee shall continue to work for said employer thereafter, with notice that the employer has elected to pay into said fund and the posting of printed or typewritten notices in conspicuous places about the employer's place of business at the time of the elections of such employer to pay into the workmen's compensation fund that he has elected to pay into said workmen's compensation fund shall constitute sufficient notice to all such employers' employees then or thereafter employed of the fact that he has made such an election, and the continuance in the service of such employers shall be deemed a waiver of the employee of his rights of action, as aforesaid. Except as provided in § 32.

"Section 31. Any employer subject to this act, electing to pay into the workmen's compensation fund, the premiums provided for L.R.A.1916A.

by this act, shall not be liable to respond in damages at common law or by statute for the injury or death or loss of service of any employee occurring through the negligence of such employer, or his agent, servants, officers or employees, during any period of time in which such employer shall not be in default in the payment of such premiums. Provided, that the injured employee has remained in his service after notice is posted as provided in § 30, that his employer has elected to pay into the workmen's compensation fund the premiums provided by this act. The continuance in the service of such employer or accepting service after such notice shall have been posted, shall be deemed a waiver by the employee of his rights of action, as aforesaid. Except as in § 32.

"Sec. 32. Any employee prior to receiving an injury may give notice to an employer who has elected to pay into said fund, that he will not accept the benefits of this act and waive his right of action as herein provided. Such notice shall be in writing and served on the employer as provided by the Civil Code for the service of notices, and a copy thereof shall be mailed by the employee to the Workmen's Compensation Board. If thereafter such employee shall be injured or killed while employed by such employer who has elected to pay into the said workmen's compensation fund, and an action shall be instituted against such employer to recover damages for the injury or death of such employee, it shall be sufficient defense thereto and shall bar recovery if the injury of said employee was caused by or contributed to by the negligence of any other employee of said employer, or if the injury was due to any of the ordinary hazards, or risks of employment, or if due to any defect in the tools, machinery, appliances, instrumentality or place of work, if the defect was known or could have been discovered by the injured employee by the exercise of ordinary care on his part, or was not known or could not have been discovered by the employer by the exercise of ordinary care in time to have prevented the injury nor in any event, if the negligence of the injured employee contributed to such injuries. But nothing herein shall deprive such employer of any defense not herein mentioned. If the employer is not in default in payment of premiums and a recovery shall be obtained against him in such action, the said Board shall pay on said judgment not exceeding a sum equal to the amount which the said injured employee or his dependents in case of death, would have been entitled to recover if he had elected to accept the benefit of this act, and the employer shall receive

credit on said payment for the payment made by the Board. Such employee, at any time, after he has elected not to accept the benefits of this act and waive his right of action, as in this act provided, may withdraw such election and come under the provisions of this act and accept its benefits and waive his right of action as herein provided by giving written notice to his employer and to the board; and shall thereafter occupy the same position as if he had originally elected to accept the benefits of this act and waive his cause of action, provided, that such withdrawal of his election not to accept the benefits of this act shall not affect the claims for damages against his employer on account of injuries theretofore received; nor entitles such injured employee to be paid anything out of the workmen's compensation fund on account of such prior injury."

"Section 34. All employers subject to this act who shall elect not to pay into the workmen's compensation fund the premiums provided by this act, or having elected to pay shall be in default in the payment of same shall be liable to their employees within the meaning of this act, for the damages by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employers, and also to the personal representatives of such employee and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following defenses: The defense of the fellow servant; the defense of the assumption of risk, or the defense of contributory negligence."

Appellant's contention is that this act is invalid; and while counsel for appellant base their reasons for reversal on many grounds, this court will content itself with an examination and inquiry into the following three grounds:

(1) It is claimed that the act is violative of § 54 of the Constitution, which provides: "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

(2) The act is compulsory in that both the employers and employees are compelled to accept its provisions, and, being compulsory, it deprives appellant of its property without due process of law, and violates § 54 of the Constitution.

(3) The act is in contravention of § 241 of the Constitution, which reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, L.R.A.1916A.

from the corporations and persons so causing the same," etc.

It is provided in § 29 above that it shall be lawful for any employee (including persons under twenty-one years of age) to contract with any employer who has paid his premium into the fund, to accept the compensation provided in this act to be paid to persons injured and the dependents of those killed, and to accept the benefits given employees by this act, in lieu of any cause of action which he might have, if injured, or that his representative might have if killed, and also to waive any cause of action he may have against his employer for injury or death occurring through the negligence of his employer or agent, and such contract shall be binding on the employer and employee and upon his heirs and representatives. Under this section the compensation of the injured man is limited to the amount specified in the schedule of the act. This constitutes a limitation upon the amount of his recovery under § 54 of the Constitution, providing that the legislature "shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property." But we think it is within the power and right of an employee to waive this limit of recovery for injury, by contract, if such contract is freely and voluntarily made.

There may never have been a word or a syllable between the employer and the employee in regard to a contract for employment to labor, yet the act provides that such contract shall be conclusively presumed to have been made between the employer and employee, if the employee continues to work for the employer after the employer has posted notices in some conspicuous places about his place of business, to the effect that he has paid his premiums into the fund and accepted the provisions of the act.

We will go a little further and examine the provisions of § 32 of this act. Suppose the employee, desiring to rely upon the causes of action given him by the Constitution and laws of this state, does not accept the so-called benefits of this act; then in that event, under § 32 of this act, the employee, prior to receiving an injury, is compelled to give notice to his employer and to the Board that he will not accept the provisions of this act. This notice must be served as provided by the Civil Code for serving notices. So if, after this notice has been served, the employee should be injured or killed while in the service of the employer, he or his personal representative may sue his employer to recover damages; then his right to recover is barred by the provisions of this act, if his injury was caused by or contributed to by the negli-



gence of any other employee of said employer, or if the injury was due to any of the ordinary hazards or risks of the employment, or if due to any defect in the tools, machinery, appliances, instrumentality, or place of work, if the defect was known or could have been discovered by the injured employee by the exercise of ordinary care on his part, or was not known or could not have been discovered by the employer by the exercise of ordinary care in time to have prevented the injury, nor in any event if the negligence of the injured employee contributed to such injuries. Now, when his right to recover is restricted by such qualifications and conditions as these, we think these qualifications and conditions constitute, within the meaning of § 54 of the Constitution, not only a limitation upon the amount to be recovered, but practically destroy his right to recovery. When an injured employee elects to decline the compensation given him by this Board, why should he be denied these causes of action—why penalized in this way? To this there is but one answer, and that is: It was the purpose and intent of this act to compel an employee to accept its provision and take the compensation allowed by the Board in lieu of any cause of action he might have against his employer for his injuries. When the employer accepts the provisions of this act, the employee is automatically drawn into this so-called contract and made subject to its provisions upon pain of being deprived of all his causes of action. It cannot, then, be said that he has voluntarily elected to accept the provisions of the contract, because he is told that unless he accepts the provisions of this act he will be deprived of all these causes of action. This certainly imposes a limitation upon his right to recover within the meaning of § 54 of the Constitution. His election should be free, not even in the alternative. The law has no right to force him to accept the compensation fixed by this Board by depriving him of his causes of action. The only remedy left to him is to accept what he can get from this Compensation Board. The action of the employer in paying into this fund his premiums and accepting the benefits of this act necessarily brings the employee within the act. The employee can go nowhere else; he has been legislated out of his causes of action, and all he can do is to accept such amount as is allowed him by this Board of Compensation. The legislature has no right to say to one of its citizens that "unless you accept the provisions of a law impairing your constitutional rights, it will take from you other rights more valuable."

In the light of § 54 of the Constitution, we must treat the contract made by the em-

ployee under the provision of this act as compulsory, and therefore void.

If any employer should determine that he wanted to carry his own risk and make his own contracts, instead of having the law to make a contract for him, he can do so. He can operate his industries and pursue his business, however hazardous, and ignore this act entirely. But what is the result? The law says to this employer: "You may go on with your business industries, but if one of your employees is injured or killed you shall not avail yourself of the following defenses: The defense of the fellow servant; the defense of the assumption of risk; or the defense of contributory negligence."

These are practically all the defenses the employer has, and they are taken from him unless he accepts the provisions of this act. He cannot, under these conditions, successfully defend any suit for personal injury. If he is sued by an injured employee, about the only question a jury will have to determine will be the amount of recovery. Under these conditions an employer has practically no choice, no volition. If he continues to operate his business, he is compelled to pay his premiums into the fund and accept the provisions of the act.

It has been well said in one of the briefs: The employer is told: "You may refuse to accept the provisions of this act, but if any suit is instituted against you for injuries received by your employees, you are deprived of all defenses thereto, and to all intents and purposes a default judgment will be rendered against you."

We cannot subscribe to the proposition, that this is a voluntary contract, even on the part of the employer.

The act under consideration is further vigorously assailed because, as contended by appellant's counsel, it contravenes § 241 of the Constitution of the state of Kentucky. Section 241 reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and person so causing same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

If an injury to an employee should result in his death, his personal representative is authorized to recover damages from the negligent person or corporation causing his death. This is an absolute right given by this section of the Constitution to his

personal representative to recover damages for such negligence as has resulted in his death. And it is immaterial, under this section of the Constitution, whether the money recovered goes to the children or parents, or becomes a part of his personal estate. The disposition of the money after his death cannot affect the right of the personal representative to recover. It may go to his heirs, or it may become a part of his personal estate and go to his creditors.

By § 42 (and subsections thereunder) of this act, the wife and children under sixteen years of age are presumed to be dependents of the deceased employee. But § 42 and its subsections further provide that no person shall be considered a dependent unless a member of the family of the deceased employee, or bears to him the relation of widower or widow, lineal descendants, ancestors, or brother or sister. Section 42 of this act also provides that if the deceased employee had no descendants, the disbursements from the compensation fund shall be limited to his nursing, medical, and funeral expenses. It then gives to this Compensation Board the sole right of action to recover from the employer (who has accepted the benefits of the act) for the death of this employee who had no dependents.

And § 43 of this act provides that no person except sole dependents of the deceased employee shall receive any benefit from this fund, and that if such employee left no dependents surviving, the amount that would be due and payable to his dependents, had any survived him, shall be paid or credited to this compensation fund for the benefit of the class to which such employee belonged.

It seems clear to us that such parts of this act as take from the personal representative or estate of a deceased employee who left no dependents surviving him, any part of the compensation due such representative or his estate, and directs its payment into this fund for the benefit of other people, is a violation of the above § 241 of the Constitution. The legislature has no right to limit the damages recovered, for the death of an employee negligently killed, to his dependents.

Nor do we think the legislature has the right to take what is due the estate of one man and give it to another. While the legislature may say how the recovery may go and to whom it shall belong, it cannot say this recovery may be had from the employer; then in the next breath give it to this fund. It then necessarily follows that such parts of this act under consideration as give to this Board of Compensation without the voluntary contract of the employee L.R.A.1916A.

the right to recover from the employer for the death of the employee leaving no dependents and such other parts of the act as coerce the employee to consent or to make a contract that such compensation shall be paid into this compensation fund, are unauthorized and void.

Many states in the Union have adopted a workmen's compensation act. And these acts, together with the decisions of the various courts construing them, have been discussed by counsel in their briefs.

We have been referred to the workmen's compensation act passed by the legislature of the state of Washington, and construed by the supreme court of that state in an able and exhaustive opinion found in the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599. This Washington act is strikingly similar to the Kentucky act now under consideration before us, except that, if a party felt himself aggrieved, he was given an appeal to the superior court of the county of his residence, and then given the right to call a jury. This Washington act was held by the court in the above cause not to be compulsory, although it took away from the employer the defenses of assumed risk, negligence of a coemployee, and contributory negligence. There being no constitutional restrictions, the legislature of the state of Washington had the power to enact the statute above referred to and it was upheld by the state supreme court.

The legislature of the state of Ohio adopted a similar workmen's compensation act. But here the injured employee had the right to have a jury fix his compensation within the limits and under the rules prescribed by the act. The supreme court of Ohio in *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, upheld the act.

The Wisconsin supreme court in *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649, held that a provision of the workmen's compensation act of that state which took away from the employer who refused to accept the provision of the act the defenses of assumed risk and negligence of a coemployee was not compulsory. The same view was held in the case of *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517. These rulings were put upon the ground that these defenses were not constitutional guaranties, but could be abolished by the legislature. But the New York act was held invalid because it did not preserve to the employer the "due process" of law guaranteed by the Constitution.



The state of New York now has a compensation act similar to the one before us, but it was especially authorized by an amendment to the New York Constitution.

It will be observed here that there was no constitutional provision in the Constitution of Washington, Ohio, Wisconsin, or New York similar to § 54 of the Kentucky Constitution, which denied to the legislature of the state of Kentucky, the "power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." The workmen's compensation acts in all of the states above named, as well as in New Jersey, Massachusetts, and California, differ from the Kentucky act in that there is an appeal granted to the state courts, or a jury is permitted to fix the amount of compensation.

This is the first workmen's compensation act ever passed by our legislature, consequently we have no decisions in this state to guide us, nor do the compensation acts of the other states furnish us very much light, because the Constitutions of these states materially differ from the Constitution of Kentucky. The Kentucky Constitution has limitations and restrictions above referred to that are not found in any of these states which have adopted compensation statutes. And for this reason a lengthy discussion of other compensation acts would be superfluous. This court is bound by the limitations contained in the Kentucky Constitution.

The counsel for appellant fiercely assail the purpose and operation of this act for many other reasons. They complain of the meager compensation it gives to the injured employee; that it deprives him of a jury trial; that employers are compelled to pay into this fund \$1.25 as a premium on each \$100 pay roll, and as a result only employers doing an extrahazardous business will take under it; that corporations whose operations are not extrahazardous will carry their own risks by the aid of indemnity companies, and by reason of which this compensation fund is liable to suffer depletion, and if an employee receives an injury, his compensation is doubtful. It is also claimed that as this is a common fund, kept up by the contributions of employers, that they will grow careless in selecting their machinery, as well as in their operations, and that the lives and limbs of the employees will suffer greater risks and injuries. A sufficient answer to all this is that these are matters addressed entirely to the wisdom of the legislature, and can be regulated as necessities may require.

The right of the state to regulate the management of industries arises from the fact that their operation may affect injuri-

ously the health, safety, morals, or welfare of persons engaged in such employments. And these come within the police power of the state,—a power sometimes difficult to understand and usually more difficult to define. It is contended for appellee that the act in question grows out of the pursuit and control of industries, by reason of which its operations come within the police power of the state. This is perhaps true, and the legislature has the right to create a Compensation Board and put it into operation free from the objectionable features of the present act.

This court looks with great favor upon a workmen's compensation act that would deal justly with the employer and employee,—one that would permit both to voluntarily take shelter under its provisions. And it is not the purpose of the court or the intention of this opinion to lay down any rule that will preclude the legislature from enacting a compensation act that will conform to the Constitution, as we are clearly of the opinion that the legislature may, in conformity to the Constitution, adopt an effective compensation law. But this court cannot consent that the legislature has the power to put this compensation act in operation by means of compulsory contracts.

Whether the constitutional restrictions herein above discussed are wise or unwise, this court is bound to obey them. It has been well said by an eminent judge that "the Constitution is the paramount law; the judge, legislature, and every citizen are bound by it. The powers of legislation are limited by it, the rights of the citizen are guaranteed and protected by it, and the courts are bound by their oaths to enforce it."

This court believes the act in question violates the Constitution of our state, and it must therefore be held invalid.

The judgment of the lower court is reversed.

**Miller, J., dissenting:**

The opinion of the majority of the court is of such far-reaching importance that I feel justified in giving the reasons for my dissent from the conclusions there reached, and in doing so I will be as brief as the necessities of the case will permit. The opinion of the majority makes it impossible for the legislature to pass any effective workmen's compensation act, under our present Constitution.

The Kentucky workmen's compensation act was approved March 21, 1914: Acts 1914, p. 226. It is a very elaborate statute, of 75 sections, providing for the creation of the compensation fund, and its administration, in every detail. The Com-

pensation Board created by that act instituted this action for the purpose of obtaining a mandatory injunction directing the defendant, the State Journal Company, an employer of labor within the state, and whose business is enumerated in § 15 of the act as subject thereto, to furnish the Board certain information relative to its business. The circuit court sustained the act, and the defendant appeals.

Counsel for appellant have gone at great length into the merits of the act. Under my view of the province of this court's powers and duty, the wisdom or propriety of the act is not before us. We are to pass only upon the questions of law,—upon the constitutionality of the act. It is sufficient to say that this court has repeatedly held that the fairness or wisdom of an act is a legislative question; and without citing the many authorities which establish so elementary a proposition, it may be sufficient to refer to the language of this court in the late case of *Eastern Kentucky Coal Lands Corp. v. Com.* 127 Ky. 717, 106 S. W. 275, where we said: "There are a number of other objections made to the statute by appellant, all of which may be grouped under the general complaint that it is harsh, oppressive, and unjust. Were these objections well grounded, they would afford no basis for relief at the hands of the court. The policy of the legislature may be looked into by the courts for the purpose only of interpreting statutes. If, then, they are found to be within the power of the legislature to enact, the business of the court is ended. . . . It is not tolerable in our form of government, with its distinct separation of powers, that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges."

The courts must necessarily assume that legislative discretion has been properly exercised. *Cooley*, Const. Lim. 7th ed. p. 257. In the interpretation of the statutes, it is an elementary rule of construction that all laws enacted by the legislature are presumed to be valid, and that it is the duty of the courts to declare them valid unless they clearly transgress some limitation upon the power of the legislature, imposed by the state or Federal Constitutions. The public policy of a state is expressed in its Constitution and statutes, and in its common law, as found in the opinions of its court of last resort; and if the Constitution or statutes speak upon a subject, the public policy of the state is fixed to that extent.

L.R.A.1916A.

If we were permitted to consider the reasons which actuated the legislature in passing this act, they might easily be found in the generally conceded harshness of the common-law rules governing the liability of employers to employees injured while engaged in service, which was forcibly stated by Chief Justice Winslow, of the supreme court of Wisconsin, in deciding *Driscoll v. Allis-Chalmers Co.* 144 Wis. 468, 129 N. W. 408, where he said: "It gives me no pleasure to state these long-established principles of the law of negligence. I have no fondness for them. If I were to consult my feelings alone, I would far prefer to let the case pass in silence. No part of my labor on this bench has brought such heart-weariness to me as that ever-increasing part devoted to the consideration of personal-injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law, which either deny relief entirely or necessitate a new trial, make drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself. If it be said that some of these rules are archaic and unfitted to modern industrial conditions, I do not disagree; in fact, that has been my own opinion for long. Upon reflection it seems that this could hardly be otherwise. Principles which were first laid down in the days of the small shop, few employees, and simple machinery, could hardly be expected to apply with justice to the industrial conditions which now surround us."

The basic principle underlying the laws of this character, of which the Kentucky act is typical, is that the business of the country should bear the financial burden of all industrial accidents rather than the workmen who happen to be the victims of particular accidents. The question of direct fault is not considered. The fact alone that the victim suffers loss of wages or bodily impairment entitles him to compensation, unless the injuries received are due to his own wilful negligence. Under the common law, damages for personal injuries are recoverable only when the accident was due to the fault of the employer or of his servants; and in many cases a recovery cannot be had, even though the employer and his servants had been negligent, if the employee had been guilty of contributory negligence. This method of adjusting individual rights is necessarily expensive, uncertain, and unsatisfactory to all parties concerned.



But whether the legislature acted for the reasons above suggested, or for any of them, if it had the right to pass the act in question, the case is ended so far as this court is concerned. With this limitation in view, I will consider, as briefly as possible, the principal objections urged against the constitutionality of the act.

It is urged that the act is compulsory, in that it, in effect, compels the employer and the employee to accept its provisions under penalty of losing their rights under §§ 54 and 241 of the Constitution, which read as follows:

"54. The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

"241. Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

As I understand the majority opinion, this is the only ground upon which it holds the Kentucky act of 1914 invalid. It tacitly overrules the many other constitutional objections urged against the act.

Section 29 provides that any employee, subject to the act, may contract with his employer, who is subject to the act, and who elects to pay the premiums provided thereby, to accept the compensation provided by the act for injured employees in lieu of any cause of action which he or his representative might have, arising from the negligence of his employer, or his agents or servants, and to waive all causes of action against said employer conferred by the Constitution or statutes of this state, or by the common law, for his injury or death occurring through the negligence of the employer or his agents.

Section 30 provides that such a contract between an employee and employer shall be conclusively presumed to have been made in every case where an employer has elected to pay into the fund, if such employee shall continue to work for the employer thereafter with notice that the employer has elected to pay into the fund; and the posting of printed or typewritten notices in conspicuous places about the employer's place of business, at the time of the election by the employer to pay into the fund, L.R.A.1916A.

that he has so elected, shall constitute sufficient notice to all of his employees of the fact that he has made such an election; and the continuance in the service of such employer shall be deemed a waiver by the employee of his right of action, except as provided in § 32.

Section 32 provides that any employee, prior to receiving an injury, may give notice to his employer, who has elected to pay into the fund, that he will not accept the benefit of the act and waive his right of action as provided thereby, such notice to be served on the employer and a copy mailed to the Compensation Board. If, thereafter, the employee shall be injured or killed while in the service of the employer, who has elected to operate under the act, and an action shall be instituted against the employer to recover damages, the employer may rely upon the defenses of contributory negligence, assumed risk, and the fellow-servant rule.

Section 34 provides that an employer who shall not elect to pay into the compensation fund the premiums provided by the act shall not, in a suit against him for personal injuries or death of an employee, avail himself of the defenses of assumption of risk or contributory negligence.

It will thus be seen that the act makes it voluntary whether any employer shall accept the provisions of the act on the one hand, or whether the employee shall work for or remain in the service of his employer after the latter has made his election to work under the act, taking from the employer, however, his common-law defenses above specified in case he declines to work under the act, and saving to the employer those defenses against his employee who refuses to accept the provisions of the act. It is contended that these provisions compel both the employer and the employee to accept the provisions of the act, by taking away their constitutional rights in case they refuse to come within the act.

Many of the earlier laws were compulsory in form, and sought to compel employers and employees to accept them in lieu of their former remedies. The New York act, which was held to be unconstitutional in *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 157, 1 N. C. C. A. 517, was by its terms compulsory. In the *Ives Case*, supra, the New York court of appeals held the act unconstitutional, because its compulsory features denied the parties due process of law, both under the state and the Federal Constitutions. It was further held in that case, however, that the abolition of the common-law defenses, the classification of industries, and the granting of new reme-

dies to the employee, were all permissible, and, further, that the act was not an undue exercise of the police power.

Later, in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, the supreme court of Washington upheld a compulsory act embodying the same features which the New York court of appeals had held were fatal to the New York act. The Washington court expressly repudiated the reasoning employed by the New York court.

Still later, in *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, the supreme court of Montana sustained a compulsory act as against the objections to it, based upon its exercise of the police power, and that it attempted class legislation, illegal taxation, denial of jury trial, due process of law, and the delegation of judicial authority. The Montana act was, however, held unconstitutional solely upon the ground that it denied the employer the equal protection of the laws, in that the compensation system was as to him exclusive, while the employee might, after receiving the injury, elect to renounce the provisions of the act and proceed in his action at law for damages against his employer, who had already been required to purchase insurance in the state fund.

In the meantime the Wisconsin compensation law was enacted, with the elective features of the Kentucky act, and the same objection was there made as is now here made, that the act was compulsory in its effect. But, in overruling that objection, and in sustaining the act, the Wisconsin supreme court, in *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 500, 133 N. W. 209, 3 N. C. C. A. 649, said: "Passing from these questions of classification, we meet the objection that the law, while in its words presenting to employer and employee a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employee can be said to act voluntarily in accepting it. As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law, the employee will feel compelled to accept also through fear of discharge if he does not accept. Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical workings of the law. L.R.A.1916A.

It may well be that many manufacturers, especially those employing small numbers of employees and in the less dangerous trades, will deliberately conclude that it will be better business policy to exercise greater care in guarding their employees from possible danger and greater discrimination in the employment of careful men, and reject the law entirely, running the risk of being able to prevent all or nearly all accidents. It seems extremely probable that the great bulk of workmen, especially of the unskilled classes, will be glad to come under the act and thus secure a certain compensation in case of injury, in place of that very uncertain and expensive thing, namely, the final result of a lawsuit. But whether this be so or not, it may be considered as reasonably certain that very many will elect to come under the act voluntarily and freely, and that those who do not will probably come from the ranks of skilled labor, who will deem the rates of compensation under the law as entirely inadequate, or will be careful workmen in the less dangerous trades, who will see no gain in bartering their common-law rights for the restricted remedies furnished by the statute. It cannot be said with any certainty that such men will be discharged for their failure to voluntarily come under the law. The probability would seem rather to be that they would be of a class which the employer would wish to keep in his employ, notwithstanding their attitude towards the law. These matters are, however, purely speculative and conjectural. None can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee."

Laws containing the elective feature have been enacted in Ohio, New Jersey, Wisconsin, Minnesota, Iowa, Massachusetts, and Illinois, where they have been upheld by the courts; and in Michigan, Connecticut, Kansas, West Virginia, Oregon, Nebraska, Nevada, New Hampshire, Rhode Island, Louisiana, and Texas, where no decisions have yet been made.

The Ohio compensation act was likewise elective in its provisions, and in *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, the constitutionality of the Ohio act was attacked upon the ground that it was coercive, and deprived persons of their freedom of contract, and of their property without due process of law, and that it was not sustainable under the police power. All of these objections were overruled, and the act was sustained throughout. In answer to the contention that the statute was coercive, the supreme court of Ohio said: "It



is urgently insisted that, while the law is apparently permissive, and leaves its operation to the election of employers and employees, it is really coercive, and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case. An examination of the section touching the questions made is here necessary. After providing in § 20-1 that an employer who elects to comply with the act shall be relieved from liability to the employee at common law, or by statute (except as provided in § 21-2), it is then enacted in § 21-1: 'All employers who shall not pay into the insurance fund . . . shall be liable to their employees for damages . . . caused by the wrongful act, neglect, or default of the employer, his agents,' etc. And in such cases the defenses of assumption of risk, fellow servant, and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, negligence, or default. His liability is not absolute, as in the case of the New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant, and contributory negligence, as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the state for a number of years past. The law known as the Norris law, passed in 1910, withdrew these defenses in the particulars covered by the law. As to the employee, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act, or default of his employer and agents as before the law was passed, and is not subject to the defenses named. If the parties are operating under the act, the employee contributes to an insurance fund for the benefit of himself or his heirs, and in case he is injured or killed, he or they will receive the benefit, even though his injury or death was caused by his own negligent or wrongful act, not wilful. And that is not all. Under § 21-2 if the parties are operating under the act and the employee is injured or killed, and the injury arose from the wilful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal requirements as to safety of employees, then the injured employee or his legal representative has his option to claim under the act or sue in court for damages. Therefore the only right of action which this statute removes from the employee is the right to sue for mere negligence (which is not wilful or statutory) of his employer, L.R.A.1916A.

and it is within common knowledge that this has become in actual practice a most unsubstantial thing. It is conceded by counsel that the particulars named in § 21-2 are such as form the basis for a large portion of claims for personal injuries. Many employers may elect to remain outside its provisions. It would not be strange if many do so. On the other hand, some workmen may feel disposed to do likewise in spite of what would seem to be to their manifest advantage in securing the benefits of the insurance. However, if there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the state within its influence and operation, that would not demonstrate its coercive character. On the contrary, it would justify the enactment. Naturally time and experience will disclose imperfections and inefficiencies in the plan; but if it should prove to be feasible, and appropriate in a general way, these imperfections can be corrected by the legislature. On account of the common-law and statutory rights still preserved to the parties by this statute (as we have pointed out), in cases where the election is made to come under its provisions, as well as not to do so, taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was said in the Wisconsin case: 'Laws cannot be set aside upon mere conjecture or speculation. The court must be able to say with certainty that an unlawful result will follow.' [147 Wis. 327.] We do not see how any such thing can be said here. Every consideration of prudence and self-interest (things not easily associated with compulsion and coercion) would seem to lead an employee to voluntarily make the contribution and waiver contemplated." And in closing its opinion in the Creamer Case, *supra*, the supreme court of Ohio said: "It is suggested that this legislation marks a radical step in our governmental policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right, or new remedy for wrong done. It is an effort to, in some degree, answer the requirements of conditions which have come in an age of invention and momentous change. The courts of the country, while firmly resisting encroachment on the Constitutions in the past, have yet found in their ample limits sufficient to enable us to meet the emergencies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will." Again, the same question was decided the

same way in *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557. The Massachusetts compensation law contained like elective provisions, and it was likewise attacked as being, in fact, compulsory. But in answer to that objection the Massachusetts justices contrasted the Massachusetts act with the New York statute, saying: "There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to. By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common-law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employee against him at common law to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the act, and whose employer has become a subscriber to the association, an action no longer can be maintained for death under the employers' liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. We do not deem it necessary to take up and consider in detail the numerous provisions by which the right to compensation and the amount thereof and the persons entitled thereto, and the course of procedure to be followed and matters relating thereto, are to be settled and determined. We assume, however, that the meaning of §§ 4 and 7 of part 3 of the proposed act is that the approved agreement or decision therein mentioned is to be enforced by proper proceedings in court, and not by process to be issued by the Industrial Accident Board itself. Taking into account the noncompulsory character of the proposed act, we see nothing in any of these provisions which is not 'in conformity with' the 14th Amendment of the Federal Constitution, or which infringes upon any provision of our own Constitution in regard to the taking of property 'without due process of law.'"

To these cases there should be added the late case of *Mathison v. Minneapolis Street R. Co.* 126 Minn. 286, L.R.A.—, —, 148 N. W. 71, 5 N. C. C. A. 871, which unanimously sustained the Minnesota workmen's compensation act of 1913, containing the

elective features, after an exhaustive review of all the constitutional objections that could be urged against it.

In speaking generally of objections made to the Illinois compensation act, the supreme court of that state, in *Deibeikis v. Link-Belt Co.* 261 Ill. 465, 104 N. E. 216, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401, said: "The other objections urged may all be answered by the statement that the act is elective, and not compulsory. Were the act deprived of its elective feature, and made compulsory upon every employer and employee engaged in the enterprises enumerated in § 2, very different and more serious questions would be presented. Being elective, the act does not become effective as to any employer or employee unless such employer or employee chooses to come within its provisions."

Without further elaboration, it is sufficient to refer to *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, and to *Hawkins v. Bleakley*, 220 Fed. 378, wherein the elective acts of New Jersey and Iowa were sustained, as not being coercive. In no case has an elective compensation act been held invalid; on the contrary, statutes containing elective features substantially like the Kentucky statute have expressly been upheld in Wisconsin, Ohio, Massachusetts, and Minnesota, while Washington and Montana have gone further and sustained compulsory acts.

Kentucky is to be the first state making this radical departure; and in doing so this court fails, it seems to me, to mark the essential legal distinction between compulsory and elective acts, by giving more effect to imaginative cases than to real cases. It may be readily conceded that, if the act were compulsory, it would be inimical to the sections of the Constitution last above referred to; but when it has been demonstrated that the act is elective only, and not compulsory in its provisions, all of these constitutional objections relating to the exercise of the police power, reasonable classification, taking property without due process of law, depriving one of a jury trial, etc., disappear as having no application to the case. They can only apply when the act is compulsory. I do not understand it to be claimed that parties may not agree to waive their constitutional or legal rights. To refuse them that right would, in itself, be unconstitutional, as depriving them of the right of free contract. These objections to elective acts have been ably and exhaustively discussed in the cases from New Jersey, Wisconsin, Massachusetts, Ohio, Minnesota, and Illinois, above referred to, and in each instance many, if not all, of these



constitutional objections have been raised, and in every case overruled.

The fact is not to be overlooked that the elective feature of the act, which is made the controlling question in the majority opinion in this case, is not inimical to any provision peculiar to the Kentucky Constitution. The elective feature is to be given the same effect under the Constitutions of the various states wherein compensation laws have been passed; the real question being in each case whether the act is in fact compulsory. If it is not compulsory, but elective, then all these constitutional objections necessarily disappear. It does not meet the argument to say that provisions like §§ 54 and 241 of the Kentucky Constitution are not found in other Constitutions. In view of the uniform line of decisions to the effect that the elective clause is elective, and not compulsory, I am of the opinion that the Kentucky compensation act is a valid and enforceable law, and should not be set aside upon a mere speculation or conjecture. As was said in *Matheson v. Minneapolis Street R. Co.* supra: "We shall not stop to discuss the shortcomings and unsatisfactory results of the law of negligence as applied to present-day industrial conditions; nor the desirability of providing more certain, effective, and inexpensive relief for injured workmen than the present common-law actions afford; nor the economic reasons for imposing upon an employer, not because he is at fault, but as a burden incident to his business, the obligation to contribute to the support of employees disabled through injuries received in the course of their employment. Much consideration has been given to these questions by publicists and students of industrial, economic, and social problems; and it has become generally recognized that the common law fails to make adequate or equitable provision for the economic loss resulting from a disability which deprives the workman of his earning power. But changes in the laws, and in the public policies recognized in the laws, must emanate from the lawmaking power, and not from the courts. The courts must administer the law as they find it, not as they may think it ought to be. Hence arguments showing the need for a change in the laws governing the relations of master and servant should be addressed to the legislative, and not to the judicial, branch of the government. The briefs have given considerable attention to these legislative questions; but it is sufficient, for present purposes, to say that the arguments advanced furnish ample basis for legislative action under the police power of the state, and that laws enacted for the purpose of adjusting and determining the respective

rights and obligations of employer and employee may make radical innovations in pre-existing policies and rules of law, so long as they do not infringe some constitutional guaranty. In considering the questions now before the court, it is proper to say, at the outset, that all laws enacted by the legislature are presumed to be valid, and that it is the duty of the courts to declare them valid, unless they clearly transgress some limitation upon the power of the legislature imposed by the state or Federal Constitution. *Roos v. State*, 6 Minn. 428, Gil. 291; *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; *Union P. R. Co. v. United States*, 99 U. S. 700, 25 L. ed. 496; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257."

Believing, as I do, that the majority opinion of the court is not sustained by reason or precedent, but is directly contrary to both, I have felt it proper, on account of the importance of the case, to give the reasons for my dissent.

Chief Justice **Hobson** and Judge **Lasing** concur in this dissent.

A petition for rehearing having been filed, **Dorsey**, Special Judge, on January 27, 1915, handed down the following additional opinion (162 Ky. 387, 172 S. W. 674):

In the petition for a rehearing we are asked to modify and extend the opinion. While in no particular receding from the position taken in the opinion herein, we have thought proper to make certain statements therein more explicit:

First. The provisions of the present compensation act, as far as they affect the employer, are unobjectionable, as they do not conflict with any provisions of the Constitution.

Second. Any employee coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury.

Third. He may likewise voluntarily accept the provisions of the act fixing the amount that shall be recovered in the event of his death, and said sum should be paid to his dependents, if he leaves any, and, if not, to his personal representatives. The legislature has no power to direct that this sum shall in any event be paid into the compensation fund.

Fourth. Some provision should be made in the act whereby the employee signifies his acceptance of the provisions of the act by some affirmative act on his part. Silence

on this subject should not be construed into acceptance.

Fifth. Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is denied, or where a less sum is

allowed by the Board than that claimed by the injured employee.

For the reasons indicated in the opinion, the act in its entirety is void.

The petition for a rehearing is overruled.

## NEW YORK COURT OF APPEALS.

RE CLAIM OF MARIE JENSEN, Resp't.,  
v.

SOUTHERN PACIFIC COMPANY, Appt.

(215 N. Y. 514, 109 N. E. 600.)

### Statute — construction — workmen's compensation act.

1. The provision for injuries received in longshore work in one section of the workmen's compensation act excludes such injuries from the provisions of another section dealing with injuries received in the operation of vessels other than those of other states or countries used in interstate or foreign commerce.

For other cases, see *Statutes*, II, a, in *Dig. 1-52 N. S.*

### Commerce — state workmen's compensation act — validity.

2. A state workmen's compensation act may be made to apply to injuries received in interstate commerce so far as they are not provided for by the Federal act, or the state is not forbidden by Congress to provide for such injuries.

For other cases, see *Commerce I.* in *Dig. 1-52 N. S.*

### Statute — construction — workmen's compensation act.

3. A state workmen's compensation act providing compensation in general terms for injuries received on railroads applies to injuries received in interstate commerce so far as they are not included in the Federal act, although the section devoted to interstate commerce provides that the provisions of the act shall apply to employers and employees in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be authorized by Congress, only to the extent that their mutual connection with intrastate commerce work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in the state may accept the provisions of the act.

For other cases, see *Master and Servant*, II, a, in *Dig. 1-52 N. S.*

### Master and servant — applicability of Federal employers' liability act to steamboat employees.

4. The Federal employers' liability act

applying to carriers by railroad does not apply to injuries received upon a steamboat operated by an interstate railroad, but not related to its rail transportation.

For other cases, see *Master and Servant*, II, a, in *Dig. 1-52 N. S.*

### Constitutional law — workmen's compensation act — due process of law.

5. A statute providing compensation for loss of earning power of injured employees, by a system of compensatory insurance to be created by employers, does not deprive the employer of his property without due process of law, although compensation must be made for injuries caused without his fault.

For other cases, see *Constitutional Law*, II, b, 4, in *Dig. 1-52 N. S.*

### Same — depriving employee of right of action — deprivation of property.

6. No unconstitutional taking of the property of an employee injured in the course of his employment is effected by depriving him of his common-law right of action against his employer, and requiring him to look to an insurance fund for compensation for loss of his earning power.

For other cases, see *Constitutional Law*, II, b, 7, b, (1), (a), in *Dig. 1-52 N. S.*

(July 13, 1915.)

**A**PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award of the State Workmen's Compensation Commission awarding compensation to claimant for the death of her husband. Affirmed.

The facts are stated in the opinion.

Mr. Ray Rood Allen, with Messrs. Burlingham, Montgomery, & Beecher, for appellant:

The workmen's compensation law deprives the employer of property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

The workmen's compensation law has no application where employer and employee are engaged wholly in interstate commerce. If held applicable, it is unconstitutional. in

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23. L.R.A.1916A.

As to the constitutionality of workmen's compensation acts, see annotation, post, 409



that it imposes a burden upon interstate commerce.

*McCabe v. Atchison*, T. & S. F. R. Co. 235 U. S. 151, 160, 59 L. ed. 169, 173, 35 Sup. Ct. Rep. 69; *Connole v. Norfolk & W. R. Co.* 216 Fed. 823; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Barrett v. New York*, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203.

Congress has established a rule of liability applicable in this case; the workmen's compensation law has no application to this injury.

*The Passaic*, 190 Fed. 644, 122 C. C. A. 466, 204 Fed. 266; *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335; *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; *Barlow v. Lehigh Valley R. Co.* 214 N. Y. 116, 107 N. E. 814; *Schuede v. Zenith S. S. Co.* 216 Fed. 566.

The act is not applicable because the claimant was engaged in the operation of a vessel of another state used in interstate commerce.

*Pacific Mail S. S. Co. v. Schmidt*, 130 C. C. A. 657, 214 Fed. 513; *The Strathnairn*, 190 Fed. 673.

*Messrs. Visscher, Whalen, & Austin*, for New York Central Railroad Company, as amicus curiæ.

The act entitled "Workmen's Compensation Law" (chap. 41, Laws 1914) is unconstitutional, being in contravention of the provisions of the 14th Amendment to the Federal Constitution.

*Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, ante, 389, 170 S. W. 437, 1166; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Middleton v. Texas Power & Light Co.* — Tex. Civ. App. —, 178 S. W. 956; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 577, 59 L. ed. 364, 369, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Hotel Bond Co's Appeal*, 89 Conn. 143, 93 Atl. 245.

Under the Federal employers' liability act, which alone measures claimant's right to a recovery, the employer is liable only for negligence, in the absence of which there is no liability whatever.

*Second Employers' Liability Cases* (Mon-dou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; L.R.A.1916A

*St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 157, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; *Taylor v. Taylor*, 232 U. S. 363, 368, 58 L. ed. 638, 640, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 490, 52 L. ed. 297, 305, 28 Sup. Ct. Rep. 141; *New York C. & H. R. R. Co. v. Hudson County*, 227 U. S. 248, 264, 57 L. ed. 499, 505, 33 Sup. Ct. Rep. 269; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 457, 59 L. ed. 671, 672, 35 Sup. Ct. Rep. 367; *Smith v. Industrial Acci. Commission*, 26 Cal. App. 560, 147 Pac. 600.

*Mr. E. C. Aiken*, with *Mr. Egburt E. Woodbury*, Attorney General, for respondent:

The workmen's compensation law is not unconstitutional.

*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554; *Memphis Cotton Oil Co. v. Tolbert*, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. ed. 287, 312; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *Exempt Firemen's Benev. Fund v. Roome*, 29 Hun, 391; *Chicago, R. I. & P. R. Co. v. Zernecke*, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

The act provides for due process of law.

*Standard Oil Co. v. Missouri*, 224 U. S. 270, 287, 56 L. ed. 760, 769, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; *Twining v. New Jersey*, 211 U. S. 78, 110, 53 L. ed. 97, 110, 29 Sup. Ct. Rep. 14; *Ballard v. Hunter*, 204 U. S. 255, 51 L. ed. 471, 27 Sup. Ct. Rep. 261; *Davidson v. New Orleans*, 96 U. S. 97,

104, 24 L. ed. 616, 619; *Public Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; *Rectz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The appellant has waived the question of the constitutionality of the act.

*Musco v. United Surety Co.* 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Mellen Lumber Co. v. Industrial Commission*, 154 Wis. 114, ante, 374, 142 N. W. 187, Ann. Cas. 1915B, 997.

The workmen's compensation law was intended to apply to the accident and disability occurring to this longshoreman.

*Stoll v. Pacific Coast S. S. Co.* 205 Fed. 169; *Chiles v. Chesapeake & O. R. Co.* 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733.

The workmen's compensation law is not in conflict with any legislation of Congress over interstate commerce, for none has been enacted; nor is it in conflict with the jurisdiction of the admiralty courts, for Congress has not yet made the jurisdiction of admiralty over torts on navigable waters exclusive of all action by the states.

The *Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 22 L. ed. 654; *Butler v. Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; *United States v. Devans*, 3 Wheat. 366, 4 L. ed. 404; *People v. Welch*, 141 N. Y. 266, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *The Abby Dodge*, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; *The Corsair* (*Barton v. Brown*) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949.

The Federal employers' liability law does not apply to the defendant, as the defendant, so far as this case is concerned, is a steamship company, and not a railroad company.

L.R.A.1916A.

*Walker v. Clyde S. S. Co.* 215 N. Y. 529, 109 N. E. 604.

Mr. **Harold J. Hinman** also for respondent.

**Miller, J.**, delivered the opinion of the court:

The claimant's husband was killed on August 15, 1914, while employed in unloading the steamship *El Oriente*, which was berthed alongside a pier in the Hudson river. When the accident occurred he was moving an electric truck upon a gangway connecting the vessel with the pier. The appellant, a corporation of the state of Kentucky, is a common carrier by railroad. It also owned and operated said steamship, which plied between New York and Galveston, Texas. It does not appear that the steamship was in any way operated in connection with a line of railroad, and in its report of the accident the appellant stated its business to be "transportation by steamships engaged solely in interstate commerce." We are required on this appeal, first, to construe the workmen's compensation law (chapter 67 of the Consolidated Laws; Laws 1914, chap. 41) in so far as it relates to this case; and, second, to determine its constitutional validity. The scheme of the statute is essentially and fundamentally one, by the creation of a state fund, to insure the payment of a prescribed compensation based on earnings, for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums paid by employers based on the pay roll, the number of employees, and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither, he is liable to a penalty equal to the pro rata premium payable to the state fund during the period of his noncompliance, and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk, and negligence of a fellow servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or results



solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits, but in addition to providing for medical, surgical, or other attendance or treatment and funeral expenses, it is based solely on loss of earning power. Thus, the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both, and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risks involved. So much for the general outline of the scheme, against whose justice or economic soundness nothing that occurs to me can be said.

The particular provisions requiring construction are the following:

"Sec. 2. Application.—Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: . . .

"Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company.

"Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage."

"Sec. 114. Interstate commerce.—The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for when a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the Commission, and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

It is claimed that loading and unloading are included in "operation," and that therefore the case falls within group 8, which excepts vessels of other states or countries used in interstate or foreign commerce, but the specific enumeration of longshore work L.R.A.1916A.

in group 10 excludes such work from the other group.

It is next claimed that the statute was not intended to apply to employment in interstate or foreign commerce, and that in case of doubt that construction should be adopted, for otherwise it would offend against the commerce clause of the Federal Constitution by imposing a burden upon such commerce. The latter claim will be noticed first. The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until Congress by entering the field excludes state action. *Sherwood v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761.

Literally construed, § 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause, "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated. The earlier sections are in terms of general application, and § 114, which is headed "Interstate commerce," is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it provided that the act should apply to interstate or foreign commerce, "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States. But it is said that Congress may at any time regulate employments in

interstate or foreign commerce, and that the case is one in which a rule "may be established," etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words "may be" should be construed in the sense of "shall be."

One other question in respect of the application of the act remains to be considered. It is said that the appellant is a carrier by railroad, and that therefore the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149; Comp. Stat. 1913, § 8657), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not, even indirectly, be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of June 11, 1906, chap. 3073 (34 Stat. at L. 232), applied to "every common carrier" engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a railroad corporation, and not otherwise,—to apply one rule of liability to transportation by a steamship line if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The Federal act provides a rule of liability of carriers by railroad for injury or death "resulting in whole or in part . . . by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The words "boats" and "wharves" may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad.

Our conclusion, therefore, is that the employment in which the deceased was engaged was not governed by the Federal statute, that the workmen's compensation act applied to it, and that the latter act is not violative of the Federal Constitution for attempting directly to regulate or impose a tax or burden on interstate or foreign commerce. We now come to perhaps the most important question in the case: Does the act violate the 14th Amendment to the Constitution of the United States for taking property without due process of law?

Much reliance is placed on the decision of this court in *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 294, 34 L.R.A. (N.S.) 162, 94 L.R.A. 1916A.

N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517. In that case Judge Werner, referring to the appeal on economic and sociologic grounds, and speaking for the court, said: "We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people, and not to the courts."

That decision was made in March, 1911. Following that suggestion, the legislature provided in the orderly way prescribed by the Constitution for the submission to the people of a proposed constitutional amendment, and in due time that amendment was adopted on November 4, 1913, and became § 19, art. 1, of our state Constitution. It is unnecessary to set that amendment forth in extenso, but it suffices to say that so far as the due process clause or any other provision of our state Constitution is concerned, the amendment amply sustains the act. However, it is urged that the reasons which constrained the court to declare the act involved in the *Ives* Case unconstitutional are equally cogent when applied to the 14th Amendment. In the first place it is to be observed that the two acts are essentially and fundamentally different. That involved in the *Ives* Case made the employer liable in a suit for damages though without even imputable fault, and regardless of the fault of the injured employee short of serious and wilful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties, and delays of litigation in all cases, and from the certainty of defeat if unable to establish a case of actionable negligence. Both acts are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should be borne by the business, and that loss should not fall on the injured employee and his dependents, who are unable to bear it or to protect themselves against it. That act made no attempt to distribute the burden, but subjected the employer to a suit for damages. This act does in fact, as well as in theory, distribute the burden equitably over the industries affected. It allows compensation only for loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation. The two acts are therefore so plainly dissimilar that the decision in the *Ives* Case is not controlling in this.

Moreover, upon the question whether an act offends against the Constitution of the United States the decisions of the United



States Supreme Court are controlling. The only one of the numerous workmen's compensation acts which appears to have been directly passed on by the United States Supreme Court is the act of Ohio, which contained an optional clause. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570. The single question decided in that case was that limiting the application of the act to shops with five or more employees did not result in arbitrary and unreasonable classification. This act is compulsory. The employer is subjected to a penalty for not adopting one of the three methods of insurance allowed him, and the employee has no choice at all, except possibly as to whether he will enter one of the classified employments. However, except for a feature presently to be considered, the decision in *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, is decisive. Indeed, upon close analysis it will appear that the taking justified in that case as a proper exercise of the police power was no more in the public interest than that involved in this case, and that the mutual benefits to the parties immediately concerned were not as direct. In that case an act of the state of Oklahoma requiring every bank existing under the state laws to pay an assessment based on average daily deposits into a guaranty fund to secure the full repayment of deposits in case any such bank became insolvent was sustained, not merely under the reserve power of the state to alter or repeal charters, but as a proper exercise of the police power. Solvent banks were thus required to pay money into a fund for the direct benefit of others, the banks benefiting only indirectly from the supposed benefit to commerce and the greater stability of banking. In this case the mutual benefits are direct. Granted that employers are compelled to insure, and that there is in that sense a taking. They insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking no doubt disappears in practical experience. As a matter of fact every industrial concern, except the very large ones who insure themselves, has for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of all injured workmen, not a part only, will receive some compensation for the loss of

earning power of the wage earner. We should consider practical experience, as well as theory, in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.

But for the matter now to be considered we need not look farther for a case controlling upon us and in principle decisive of this. Whilst the *Noble State Bank Case* was referred to in the *Ives Case*, it was not controlling, for the reason that the state Constitution was involved, and it was not in point as an authority because of the essential differences in the act then before the court, already pointed out.

A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. Of course, the employer cannot be heard to urge the grievance of the employee (*Jeffrey Mfg. Co. v. Blagg*, supra), but exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme, and if the act be unconstitutional as to the employee the employer would be deprived of that exemption, and thus would be directly affected by the unconstitutionality of the act in that respect. It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but, if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.

Moreover, the act does not deal with intentional wrongs, but only with accidental injuries, and no account is taken of the presence or absence of the negligence attributable to the employer. In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of

others under the doctrine of respondeat superior. That doctrine has been developed by the courts to make the principal accountable for the conduct of his affairs, though it must be remembered that it does not rest on the doctrine of agency. No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the legislature. No one doubts that the doctrine of assumption of risk and the fellow servant doctrine, also developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the legislature. Acts having that effect have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of the employment, including the risk of a fellow servant's negligence, and even of negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the legislature to provide that the employee should assume the risk of all accidental injuries, and if that can be done, it is certainly competent for the legislature to provide by the creation of an insurance fund for a limited compensation to the employee for all accidental injuries, regardless of whether there was a cause of action for them at common law.

This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed which almost universally favors a more just and economical system of providing compen-

sation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the state, in the promotion of the general welfare, to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may, in exceptional cases, work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written Constitution guarantying individual rights. The question is often one of degree. The act now before us seems to be fundamentally fair to both employer and employee. Of course, I do not speak of details which may or may not be open to criticism, but which, granting the validity of the underlying principle, are plainly within the province of the legislature. It is not open to the objections found to be fatal to the act considered in the *Ives* Case. It is plainly justified by the amendment to our own state Constitution, and the decisions of the United States Supreme Court, notably in the *Noble State Bank* Case, make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States.

The order of the Appellate Division should be affirmed, with costs.

Willard Bartlett, Ch. J., and Collin, Cuddeback, Cardozo, and Seabury, JJ., concur. Werner, J., not sitting.

### **Annotation—Constitutionality of workmen's compensation and industrial insurance statutes.**

As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to the limitation of applicability of the state compensation statute by Federal laws, see annotation, post, 461.

#### **In general.**

The constitutionality of workmen's compensation and industrial insurance statutes was discussed in annotations to *Ives v. South Buffalo R. Co.* 34 L.R.A. (N.S.) 162, and *State ex rel. Davis-Smith Co. v. Clausen*, 34 L.R.A. (N.S.) 466; but as those cases were pioneer cases and there was little or no case law upon the subject at the time those annotations were prepared, the cases will be L.R.A.1916A.

included in this annotation. Moreover, a consideration of those cases in connection with the more recent cases is necessary to show the present status of the case law on this subject.

From the standpoint of the constitutionality of these statutes they readily fall into two distinct groups: (1) those that are optional and afford an opportunity to the parties to elect whether or not they will be bound by them; (2) those that are compulsory and furnish no such election. The great majority of the statutes are optional in character, but both of the New York statutes and those of Washington, California, Montana, and Ohio are compulsory in char-



acter. In this connection attention is called to the fact that in New York, California, and Ohio, constitutional amendments have been adopted which permit, so far as the state Constitution is concerned, the passage by the legislature of compulsory compensation acts.

So far as the optional statutes are concerned, although their invalidity has been alleged in many cases, it is sufficient to say that the courts have invariably taken the position that the statutes, being optional, are constitutional. In one or two cases, some minor provision relative to the practice or procedure under the act has been held invalid, but, as a general rule, the only contention to which any particular weight has been given by the court is the method taken by the statute to compel the parties to accept the terms thereof. Having decided that the statutes are, in fact, optional, and afford a voluntary election to accept or reject them, the entire problem is solved. It is to be noticed that the chief fault of the statute found invalid by the Kentucky court in *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION Bd.* was that the act was not optional, but the parties were in fact coerced into accepting it.

The compulsory statutes are of two distinct kinds: first, direct liability acts, or those which impose the duty upon the employer to compensate his employees for injuries actually received in the particular employment; second, industrial insurance acts, which require the employers to subscribe to a state insurance fund or to take out insurance in some other way, and provide for the payment of compensation to injured employees out of the state fund or by the insurer. The California act presents both the direct payment and the industrial insurance features.

The chief objection raised against compulsory acts is that they violate the due process and equal protection clauses of the Constitution, both state and Federal. This objection will be discussed in the subdivision of the note entitled, "Due process and equal protection of the law."

In regard to the subdivisions of the note, it may be said that they are not mutually exclusive. Many objections embrace two or more of the points indicated in the headings, and these headings have been inserted rather for the convenience of the reader than for making logical subdivisions of the note.

A number of decisions have asserted in general terms that the statute in *ques-*

*tion* was constitutional, merely upon the authority of a prior case, and without any discussion of the question, or adding anything of value. These cases will be grouped at this point in the annotation, since it is impossible to tell what contentions were made in them.

Thus, following *Mathison v. Minneapolis Street R. Co.* (1914) 126 **Minn.** 28, L.R.A.—, —, 148 N. W. 71, 5 N. C. C. A. 871, *infra*, the Minnesota act was held constitutional in *State ex rel. Nelson-Spellisey Co. v. District Ct.* (1914) 128 **Minn.** 221, 150 N. W. 623; *Johnson v. Nelson* (1914) 128 **Minn.** 158, 150 N. W. 620. So, following *Deibeikis v. Link-Belt Co.* (1914) 261 **Ill.** 454, 104 N. E. 211, 5 N. C. C. A. 401, *Ann. Cas.* 1915A, 241, *infra*, the Illinois act was held constitutional in *Dietz v. Big Muddy Coal & I. Co.* (1914) 263 **Ill.** 480, 105 N. E. 289, 5 N. C. C. A. 419; *Crooks v. Tazewell Coal Co.* (1914) 263 **Ill.** 343, 105 N. E. 13, 5 N. C. C. A. 410, *Ann. Cas.* 1915C, 304. And following *State ex rel. Davis-Smith Co. v. Clausen* (1911) 65 **Wash.** 156, 37 L.R.A.(N.S.) 466, 117 **Pac.** 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, *infra*, the Washington compensation act was held valid in *Stoll v. Pacific Coast S. S. Co.* (1913) 205 **Fed.** 169, 3 N. C. C. A. 606; *State ex rel. Pratt v. Seattle* (1913) 73 **Wash.** 396, 132 **Pac.** 45; *State v. Mountain Timber Co.* (1913) 75 **Wash.** 581, L.R.A.—, —, 135 **Pac.** 645, 4 N. C. C. A. 811. And following the decision in *State ex rel. Yaple v. Creamer* (1911) 85 **Ohio St.** 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30, *infra*, the Ohio statute was held constitutional in *Jeffrey Mfg. Co. v. Blagg* (1914) 90 **Ohio St.** 376, 108 N. E. 465.

In reference to a number of objections to the validity of the Kansas act, the court said in a very general manner that the objections had been met and discussed in a number of decisions in other jurisdictions, and that it was sufficient to say that the statute, being optional, was not open to the objections raised. *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 93 **Kan.** 257, 144 **Pac.** 249.

In *Przykopski v. Citizens' Coal Min. Co.* (1915) — **Ill.** —, 110 N. E. 336, the Illinois supreme court reversed a judgment of the lower court, which was based upon the theory that the Illinois act was unconstitutional.

The supreme court of California, in deciding a case arising under the act of 1911, refused to consider the validity of the compensation features of the act of 1913, merely because the Commission

provided for by the latter act was empowered to carry out the provisions of the former act as to any case arising prior to the effective date of the later act, where the provisions of such later act relative to the powers and duties of the Commission were not attacked, and such provision might be upheld even if the compensation features of the act were bad. *Great Western Power Co. v. Pillsbury* (1915) — **Cal.** —, 149 Pac. 35.

The insurance features of the Iowa act, under different circumstances, were held lawful by several decisions of the Iowa supreme court prior to their incorporation in the Iowa statute. *Hawkins v. Bleakley* (1914) 220 **Fed.** 378. The court said: "The Chicago, Burlington, & Quincy Railroad Company for years had a scheme of insurance which, if resorted to by the injured employee, was a bar to a recovery by an action in court. Finally that scheme was condemned by Iowa legislation, and the statute prohibiting it was sustained by the United States Supreme Court, affirming the Iowa supreme court, in the *McGuire Case* (1911) 219 **U. S.** 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, hereinbefore referred to. The insurance scheme was held lawful by the Iowa supreme court in a number of cases prior to the adoption of the legislation referred to, and now we have additional legislation allowing the very thing condemned by the prior legislation. And so it is that no constitutional objection can be made to the latest legislation."

In *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION Bd.* the court said: "The counsel for appellant fiercely assail the purpose and operation of this act for many other reasons. They complain of the meager compensation it gives to the injured employee; that it deprives him of a jury trial; that employers are compelled to pay into this fund \$1.25 as a premium on each \$100 pay roll, and as a result only employers doing an extrahazardous business will take under it; that corporations whose operations are not extrahazardous will carry their own risks by the aid of indemnity companies, and by reason of which this compensation fund is liable to suffer depletion; and if an employee receives an injury, his compensation is doubtful. It is also claimed that as this is a common fund, kept up by the contributions of employers, that they will grow careless in selecting their machinery, as well as in their operations, and that the lives and limbs

of the employees will suffer greater risks and injuries. A sufficient answer to all this is, that these are matters addressed entirely to the wisdom of the legislature, and can be regulated as necessities may require."

As is stated above, minor provisions of several of the statutes have been held invalid, but these provisions are separable from the remainder of the act, and their invalidity does not affect the validity of the act as a whole.

The provision of § 9, clause F, of the Illinois act 1913, providing that the supreme court shall have power to review questions of law by certiorari, mandamus, or any other method permissible under the rules and practice of said court or the laws of the state, is invalid as violating article 6, § 2, of the Constitution, which gives the supreme court original jurisdiction "in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases." *Courter v. Simpson Constr. Co.* (1914) 264 **Ill.** 488, 106 N. E. 350, 6 N. C. C. A. 548.

Section 75, subdivision 6, of the California act, which purports to give the Commission power "to regulate and prescribe the nature and extent of the proof and evidence" required in proceedings under the act, is invalid as being in excess of the authority given by § 21, article 22, of the state Constitution, which is the only authority for the provisions authorizing such matters to be determined by the Commission instead of by the court. *Englebreton v. Industrial Acci. Commission* (1915) — **Cal.** —, 151 Pac. 421.

In *Herkey v. Agar Mfg. Co.* (1915) 90 Misc. 457, 153 **N. Y. Supp.** 369, Crane, J., at special term, said that while it was his opinion that the statute could not compel an employee to accept of its provisions, nevertheless he would not hold that the act was inoperative as to an employee electing to proceed under the common law, for his decision might be followed by injured servants and then overturned by the higher courts, so that such employees would have lost forever all rights under the compensation act, and would also be barred from an action for damages.

#### — validity of statute as affected by title.

In a number of cases it has been contended that the statute under discussion is invalid as violating the constitutional provision that statutes shall not contain more than one subject, which is to be



expressed in the title. These contentions have been rejected, the court taking the position that this constitutional provision is not to be narrowly or strictly construed. *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 93 **Kan.** 257, 144 **Pac.** 249; *Mackin v. Detroit-Timkin Axle Co.* (1915) — **Mich.** —, 153 **N. W.** 49; *Memphis Cotton Oil Co. v. Tolbert* (1914) — **Tex.** Civ. App. —, 171 **S. W.** 309, 7 **N. C. C. A.** 547.

The New Jersey act is not unconstitutional as embracing two objects where one only is expressed in the title. *Huyett v. Pennsylvania R. Co.* (1914) 86 **N. J. L.** 683, 92 **Atl.** 58. The court said that the phrase "injuries received by the employee" naturally and properly include injuries resulting in death.

The title of the New Jersey compensation act of 1913 is sufficient to express the object of legislating as to employees of municipalities. *Allen v. Millville* (1915) — **N. J. L.** —, 95 **Atl.** 130.

But a title to an act providing compensation for accidental injury will not cover a provision for compensation for occupational disease. *Adams v. Aeme White Lead & Color Works*, (1914) 182 **Mich.** 157, ante, 283, 148 **N. W.** 485, 6 **N. C. C. A.** 482.

The title of the Washington act, indicating that the act relates to compensation of injured workmen, is broad enough to include the abolition of negligence as a ground of recovery against third persons, since it indicates that the act is intended to furnish the only compensation to be allowed. *Peet v. Mills*, (1913) 76 **Wash.** 437, ante, 358, 136 **Pac.** 685, 4 **N. C. C. A.** 786, **Ann. Cas.** 1915D, 154.

#### — presumption as to election to come in under the act.

The provision of the Michigan act that an employee shall be deemed to have accepted and shall be subject to the provisions of the act, if, at the time of the accident, the employer charged with such liability is subject to the provisions of the act, whether the employee has actual notice thereof or not, is not unconstitutional as coercive, where the employee has the right in the first instance to give to his employer notice in writing that he elects not to come in under the act. *Mackin v. Detroit-Timkin Axle Co.* (1915) — **Mich.** —, 153 **N. W.** 49.

Paragraph 9 of the New Jersey act of 1911, creating a presumption that, with respect to contracts of hiring, made after the accident became effective, the parties are acting under the 2d section, **L.R.A.** 1916A.

if one or the other does not then or before the accident expressly elect to operate under the first, is a valid exercise of the powers of the legislature. *Sexton v. Newark Dist. Teleg. Co.* (1913) 84 **N. J. L.** 85, 86 **Atl.** 451, 3 **N. C. C. A.** 569. The court said that the matter really came down to a question of presumption or burden of proof which was entirely within the control of the legislature as long as the parties are left entirely free to make whatever choice they wish.

The option afforded by the Minnesota act is no less voluntary and optional because the parties are deemed to have accepted the provisions unless they give notice to the contrary, than it would be if they were deemed not to have accepted them until they gave notice to that effect. *Mathison v. Minneapolis Street R. Co.* (1914) 126 **Minn.** 286, **L.R.A.** —, —, 148 **N. W.** 71, 5 **N. C. C. A.** 871.

But in *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION BD.* it is to be noted that the court condemns the provisions of the act that an employee shall be conclusively presumed to have accepted the provisions of the act unless he takes the affirmative steps of giving notice to the contrary, this view being concisely stated by Dorsey, Special Judge, in his opinion on the rehearing: "Silence on this subject should not be construed into acceptance."

#### — who may question validity of statute.

Frequently the constitutionality of the statutes under discussion has been questioned as to points which do not affect the party raising the question; but the court has held that it is only the constitutional rights of the party alleging the invalidity of the statute that can be protected in the proceeding.

Thus, in *Sexton v. Newark Dist. Teleg. Co.* (1913) (**N. J.**) supra, the court said: "Any consideration of the constitutional aspect, either of the act or of the supplement, must be limited to the question whether the proceedings under review violate the constitutional right of the prosecutor. The question cannot be broader than that raised by the facts. That the act or the supplement may or may not deprive parties to supposititious cases of constitutional rights has no bearing upon the present case if it appears that the parties before the court are not deprived of constitutional rights by the proceedings under review."

An employer will not be heard to al-

lege that the constitutional rights of his employees are infringed.

Thus, an employer cannot raise the question of unconstitutionality of a statute because his employees are unfairly treated. *Hunter v. Colfax Consol. Coal Co.* (1915) — **Iowa**, —, L.R.A.—, —, 154 N. W. 1037.

So, an employer cannot object to the discrimination so far as it affects employees by themselves, which the Ohio act makes as between employees in shops with five or more employees and those in shops having a lesser number. *Jefrey Mfg. Co. v. Blagg* (1914) 235 **U. S.** 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 169, 7 N. C. C. A. 570.

And an employer who has not accepted the provisions of the law, and has had a trial by jury upon all the issues in the case, will not be heard to complain that others who accept the provisions of the act are denied trial by jury. *Wheeler v. Contoocook Mills Corp.* (1915) 77 **N. H.** 551, 94 Atl. 265.

Nor can an employer who has voluntarily accepted the benefit of the workmen's compensation act defeat its operation on the theory that it deprives him of due process of law. *Mellen Lumber Co. v. Industrial Commission*, (1913) 154 **Wis.** 114, ante, 374, 142 N. W. 187, Ann. Cas. 1915B, 997.

So, a claim by an adult employee that the Michigan act is unconstitutional in that it deprives the parent of right of action for injury to his minor child is untenable. *Mackin v. Detroit-Timkin Axle Co.* (1915) — **Mich.** —, 153 N. W. 49.

A taxpayer has no ground for bringing an action to restrain the payment of salaries to the Industrial Insurance Board, created by chap. 50 of the Laws of 1911, upon the ground that such act was unconstitutional, where the members of the Board have many duties to perform in addition to the duties sought to be imposed upon them by the workmen's compensation act. *Re Filer & S. Co.* (1911) 146 **Wis.** 629, 132 N. W. 584.

It is interesting to note in this connection that the Kentucky court, in *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION Bd.* did hold that the Kentucky act was invalid in its entirety, in an action in which only the state board and the employer were parties, although the unconstitutionality was based solely upon the infringement of the rights of the employee and of his personal representative or dependents. L.R.A.1916A.

### Abrogation of common-law defenses.

The optional acts, although furnishing an opportunity to the parties to accept or reject the provisions of the act, nevertheless attempt to compel them to accept by depriving the employer who refuses to come in of the defenses of assumption of risk, negligence of fellow servants, and contributory negligence, while retaining them in full force as against the employee who fails to subscribe to the act. These provisions have been uniformly upheld by the court upon the ground that the defenses are merely rules of law, and it is within the power of the legislature to abolish them. *Hawkins v. Bleakley* (1914) 220 **Fed.** 378 (Iowa statute); *Hotel Bond Co's Appeal* (1915) 89 **Conn.** 143, 93 Atl. 245; *Hunter v. Colfax Consol. Coal Co.* (1915) — **Iowa**, —, L.R.A.—, —, 154 N. W. 1037; *Hovis v. Cudahy Ref. Co.* (1915) 95 **Kan.** 505, 148 Pac. 626; *Wheeler v. Contoocook Mills Corp.* (1915) 77 **N. H.** 551, 94 Atl. 265; *Sexton v. Newark Dist. Teleg. Co.* (1913) 84 **N. J. L.** 85, 86 Atl. 451, 3 N. C. C. A. 569; *Ives v. South Buffalo R. Co.* (1911) 201 **N. Y.** 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, 1 N. C. C. A. 517, Ann. Cas. 1912B, 156; *De Francesco v. Piney Min. Co.* (1915) — **W. Va.** —, 86 S. E. 77.

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act), as in its wisdom, in the exercise of powers intrusted to it by the Constitution, it deems will be best for the 'good and welfare of this commonwealth.'" Opinion of Justices (1911) 209 **Mass.** 607, 96 N. E. 308, 1 N. C. C. A. 557.

So, in *Hawkins v. Bleakley* (1914) 220 **Fed.** 378, the court said: "But it is argued that if the employer fails to elect to come within the statute and have the case tried and determined, as heretofore, the employer cannot urge the defense of assumption of risks by the employee or contributory negligence. And yet each of these defenses first crept into the law by slight recognition, and then grew and developed by judicial decisions without the aid of legislation. And it cannot be so that simply because such became recognized as the law by judicial decisions, they cannot be abridged or denied by legislation."

Power to abolish the defenses of contributory negligence, assumption of risk,



and negligence of coemployees, rests upon the principle that no person has any property right or vested interest in a rule of law, and that the legislature may change such rules at pleasure. *Mathison v. Minneapolis Street R. Co.* (1914) 126 Minn. 286, L.R.A.—, —, 148 N. W. 71, 5 N. C. C. A. 871.

Taking away the common-law defenses of assumption of risk, contributory negligence, and the negligence of a fellow servant, and putting upon the employers the burden of proof as to their negligence or lack of negligence, as a means of compelling employers to accept the provisions of the Iowa act, is not unreasonable coercion. *Hunter v. Colfax Consol. Coal Co.* (1915) — *Iowa*, —, L.R.A.—, —, 154 N. W. 1037.

A section of the workmen's compensation act, abolishing the defenses of assumption of risk and fellow service in actions to hold employers liable for personal injuries to servants, in cases where the provisions of the act are not accepted, cannot be said to make the act coercive upon every employer or employee, so as to raise the question of the constitutionality of such obligation, on the theory that the employer will be compelled to accept the statute because of the loss of such defenses, and the employee will be compelled to do so to avoid dismissal from service. *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

It is to be noted that the Kentucky court, in *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION Bd.* held, on the rehearing, that the provisions of the act were unobjectionable as far as they affected the employer, as they did not conflict with any provision of the Constitution, although in the original hearing the court had taken the position that, even so far as the master was concerned, it was not a voluntary contract, inasmuch as it took away the affirmative defenses in case the masters did not elect to come in under the act.

The abolition of these defenses has been said to be merely a declaration of the policy of the state.

Thus, in *De Francesco v. Piney Min. Co.* (1915) — *W. Va.* —, 86 S. E. 77, the court said that these defenses are such that the legislature had a clear right to eliminate them for reasons of public policy.

So, the deprivation of an employer of the defenses of contributory negligence, assumption of risks, and coservice, in order to induce him to accept the pro-

visions of the act, is "merely a declaration by the legislature of the public policy of the state in that regard." *Hotel Bond Co's Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

"It cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant, and contributory negligence, as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the state for a number of years past." *State ex rel. Yapple v. Creamer* (1912) 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30.

It is to be noted, however, that the Kentucky court, in *KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION Bd.* has held that the Kentucky act of March 21, 1914 (*Laws 1914*, chap. 73), by taking away from an employee who does not come in under it, a right of recovery if his injury was caused by the negligence of a fellow servant, or if he assumed the risk, or was guilty of contributory negligence, was invalid, as compulsory. It is not entirely clear, however, that their decision would not have been different had they not been influenced by § 54 of the state Constitution, which forbids the limiting of the amount to be recovered for injuries resulting in death, or for injuries to person or property.

#### **Due process and equal protection of the law — optional statutes.**

The courts have invariably held that the optional statutes do not infringe the due process and equal protection provisions of the Constitution.

The Illinois workmen's compensation act of 1911 does not deprive an employee of his liberty and property without due process of law, since the act is elective, and not compulsory. *Deibeikis v. Link-Belt Co.* (1913) 261 Ill. 454, 104 N. E. 211, 5 N. C. C. A. 401, Ann. Cas. 1915A, 241.

The Kansas act of 1911, as amended by the Laws of 1913, being optional, does not violate § 18 of the Bill of Rights nor the provisions of the 14th Amendment to the Federal Constitution relating to due process and equal protection of the laws. *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 93 Kan. 257, 144 Pac. 249.

The Massachusetts law, not being compulsory, does not take property without due process of law. *Opinion of Justices* (1911) 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557.

Part 2 of the act substitutes the rights, remedies, and liabilities therein provided for those previously existing, and employers and employees subject thereto are limited to such rights and remedies; but such provisions impair no constitutional right, as they apply only to those who have voluntarily chosen to become subject thereto, and such choice is no less optional because part 2 is presumed to have been accepted by all employers and employees who have not given notice to the contrary. *Mathison v. Minneapolis Street R. Co.* (1914) 126 Minn. 286, L.R.A.—, —, 148 N. W. 71, 5 N. C. C. A. 871.

Section 2 of the New Jersey act of 1911, providing that compensation shall be made "without regard to the negligence of the employers," being elective, is not unconstitutional as being violative of the due process clause of the Constitution. *Sexton v. Newark Dist. Teleg. Co.* (1913) 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.

The Texas act, being optional, is not violative of the due process or equal protection clauses of the Federal Constitution. *Memphis Cotton Oil Co. v. Tolbert* (1914) — *Tex. Civ. App.* —, 171 S. W. 309, 7 N. C. C. A. 547.

The act is elective rather than compulsory in order to avoid a claim of its unconstitutionality. *Hotel Bond Co's Appeal* (1915) 89 Conn. 143, 93 Atl. 245.

In *Albanese v. Stewart* (1912) 78 Misc. 581, 138 N. Y. Supp. 942, in an action which arose in New Jersey, the court overruled a demurrer to the defendant's answer, setting up the unconstitutionality of the New Jersey statute. The court said that while compulsory compensation was unconstitutional, the New Jersey act was optional, or elective.

Permitting an administrative board which acts only by consent of the parties interested, to take testimony without notice to either party, and to give notices by mail, does not deprive the parties of due process of law. *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 39 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

In *State ex rel. Yapple v. Creamer* (1912) 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30, the Ohio court, in holding that the statutes of that state did not take private property without due process of law, and deny the guaranties of the Constitution, said: "Under the law under investigation here, as already shown, the right of action (for injury by wilful act of the employer and for his failure to comply

with requirements as to the safety of employees) is still reserved to the employees. So that the only thing withdrawn by this law, and to which withdrawal he consents by his voluntary election to operate under the law, is his right of action for mere negligence; and in place of it he receives the substantial protections and privileges under the state insurance fund. . . . We think that in a case such as is presented here, in which the state itself has undertaken a great enterprise in the interest of the general good, and in the exercise of its police power, and presents to its citizens the option to join in the undertaking and receive its protection and benefit, on a right of action being withdrawn by the legislature, which experience has shown to be difficult of practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is a violation of the Constitution in the respects claimed."

#### — compulsory acts.

The validity of the compulsory statute has been passed upon by the highest courts of New York, Washington, Montana, and California. These decisions will be taken up in the order in which they were rendered. The character of the different statutes will be shown, and some quotations from the decisions will be given to show as accurately as possible the attitude of the court rendering the decision.

It should be especially noted that the Constitutions of New York, California, and Ohio have been amended so as to permit the passage of the compulsory compensation act without infringing the due process clauses of the state Constitution. The similar provisions of the Federal Constitution, however, are still to be considered. There appears as yet to be no decision as to the validity of the Ohio act passed subsequently to the amendment of the Constitution.

The first compensation act passed in the United States was the New York act of 1910, being chapter 674 of the Laws of that year. This statute was applicable only to the so-called hazardous employments specifically mentioned in the act. It provided a scale of compensation to be paid by the employer directly to an injured employee, although the injuries may have been caused by no fault on the part of the master; and it reserved to the employee any existing right of action for damages caused by negligence upon the part of the master.



This statute was pronounced unconstitutional by the New York court of appeals in *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, 1 N. C. C. A. 517, Ann. Cas. 1912B, 156. The decision of the court was placed squarely upon the ground that inasmuch as the statute made the employer liable in cases in which he had not been at fault, it was in violation of the clauses in the Federal and state Constitutions which prohibit a deprivation of liberty and property without due process of law. Although this particular statute is open to certain objections peculiar to itself, which could be reasonably argued as invalidating it, nevertheless the court did not base its decision upon any such ground, but condemned the entire theory of rendering an employer liable for injuries to an employee where he had been without fault. The court said: "We have tried to make it clear that, in our judgment, this statute is not a law of regulation. It contains not a single provision which can be said to make for the safety, health, or morals of the employees therein specified, nor to impose upon the enumerated employers any duty or obligation designed to have that effect. It does not affect the status of employment at all, but writes into the contract between the employer and employee, without the consent of the former, a liability on his part which never existed before, and to which he is permitted to interpose practically no defense, for he can only escape liability when the employee is injured through his own wilful misconduct."

This decision was rendered subsequent to that of the United States Supreme Court in *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, in which it was held that the levy and collection under a state statute from every bank existing under the state laws, of an assessment based upon the average daily deposit, for the purpose of creating a depositors' fund to secure the whole repayment of deposits, in case any such bank should become insolvent, is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law. A similar decision was rendered in *Assaria State Bank v. Dolley* (1911) 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189.

The following quotation from the decision of the New York court of appeals L.R.A.1916A.

in the *Ives Case* shows clearly that the state court was not disposed to follow the United States Supreme Court, that is, of course, as to the construction of the provisions of the State Constitution. The court said: "As to the cases of *Noble State Bank v. Haskell* and *Assaria State Bank v. Dolley* (U. S.) supra, we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the 'prevailing morality' or the 'strong and preponderant opinion' it is deemed 'to be greatly and immediately necessary to the public welfare,' we cannot recognize them as controlling of our construction of our own Constitution. That the business of banking in the several states may be regulated by legislative enactment is too obvious for discussion. That the extent to which such state regulation may be carried must depend upon the difference in constitutional provisions is also plain. How far these late decisions of the Federal Supreme Court are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare, we are not prepared to decide. All that it is necessary to affirm in the case before us is that, in our view of the Constitution of our state, the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."

Further discussion of this decision will be found in connection with the discussion of the *JENSEN CASE*, infra.

The next statute of a compulsory character is the Washington act of March 14, 1911 (Laws 1911, p. 345). This act also applies to certain expressly designated hazardous employments. Instead of being a direct liability statute, similar to that pronounced invalid in the *Ives Case*, it provided for the creation of a fund known as the "accident fund," to which all employers engaged in the hazardous employments enumerated were obliged to contribute, the contributions being based upon the hazardousness of the employment, and compensation to an injured employee being payable out of the fund.

The constitutionality of this statute was upheld in *State ex rel. Davis-Smith Co. v. Clausen* (1911) 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, both against the contention that it created a liability without fault, and that it took the prop-

erty of one employer to pay the obligations of another.

The Washington court said that it must be conceded that these contentions had a basis in fact, and that they on first impression constituted a persuasive argument against the validity of the act. Upon this point the court said: "Since there is exacted from every employer of labor engaged in one or more of the industries termed 'hazardous' a certain fixed sum based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another."

But the court said that the test of the validity of the law was not whether it creates a liability without fault, or whether it takes the property of one person to pay the obligations of another, but rather whether there is any reasonable ground to believe that the public safety, health, or general welfare is promoted thereby. And the court went on to say: "The clause of the Constitution now under consideration was intended to prevent the arbitrary exercise of power or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation when measured by this clause of the Constitution is reasonableness as contradistinguished from arbitrary or capricious action."

After citing numerous cases in which it said that statutes had been upheld by courts which could be said to create liability without fault, and take the property of one person to pay the obligations of another, the Washington court summed up its argument on this branch of the case as follows: "If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because

it may incidentally deprive some person of his property without fault, or take the property of one person to pay the obligations of another. To be fatally defective in these respects the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights. That the statute here in question has the attribute of reasonableness rather than that of capriciousness seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. . . . Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them; or perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound we think must be conceded. . . . The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases,—cases where the injury is the result of fault on the part of the employer,—and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument."

The court further said: "It is not meant here to be asserted that this power is above the Constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil, or promote some interest of the state, and is not in violation of any direct and positive mandate of the Constitution."

In speaking of the Ives case, the Washington court said: "The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same, and it must be conceded that the case is direct authority against the po-



sition we have here taken. We shall offer no criticism of the opinion. We will only say that, notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken."

The difference in the attitude of the two courts may be further shown by a comparison of two quotations, one from the Ives decision, and the other from a decision by the Washington court in a subsequent case.

Thus the New York court said: "If it is competent to impose upon an employer who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B; and that cannot be done under our Constitutions."

While in *State v. Mountain Timber Co.* (1913) 75 Wash. 581, L.R.A.—, —, 135 Pac. 645, 4 N. C. C. A. 811, the Washington court said: "The legislature has said to the man whose business is a dangerous one, and the operation of which may bring injury to an employee, that he cannot do business without waiving certain rights and privileges heretofore enjoyed, and it has said to the employee that, inasmuch as he may become dependent upon the state, that he must give up his personal right of contract when about to engage in a hazardous occupation, and contract with reference to the law."

The Washington court quotes the decision of the United States Supreme Court, the *Noble State Bank Case*, at considerable length, and relies upon it to answer the objection that the act took private property for a private use and created a liability without fault.

The next statute to be considered is the Montana act (Laws 1909, chap. 67, p. 81). This enactment provided a state accident insurance and total disability fund for coal miners and employees of coal washers. The fund was created by levying contributions on both the employers and the employees.

In *Cunningham v. Northwestern Improv. Co.* (1911) 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, the court took the position that the general scheme of L.R.A.1916A.

the Montana act in providing a system of industrial insurance for miners was justifiable under the police power of the state, since it tended to minimize indigency and the enormous expense of operating courts.

The assessment to be paid by the mine operators and the miners, under the Montana act, was held to be in the nature of an occupational tax, and consequently the imposition of this tax did not deprive either the miners or their employers of their property without due process of law. The court further said that if a statute tended to prevent the evils growing out of and incident to the present system of actions for faults, it ought to be upheld so far as that point is concerned, although the statute did not expressly abolish that system. This statute was also upheld against the contention that it was void because it did not differentiate between a careful and a careless employer.

The decisions in the *Noble State Bank* and *Clausen Cases* were cited as authority for the conclusion of the Montana court; the Ives Case was also cited; but the conclusion of the New York court that the statute therein involved was invalid does not appear to have been touched upon.

While the general scheme of the act was sustained by the court, the act was pronounced unconstitutional because it reserved to the employee his right to an action at law, and consequently the mine operator, although he contributed to the fund, was not relieved from all liability because of the injury. The court said: "The duty to make payment as provided in § 2 is absolute and unconditional. It can be enforced by appropriate action. But, after full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the act and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws."

It may be pointed out that the ground

for holding the Montana statute unconstitutional could also have been urged against the New York act, but the court of appeals made no mention of this fact.

The next act is the second workmen's compensation statute of New York (Laws 1914, chap. 41), which is upheld in *JENSEN v. SOUTHERN P. Co.* This act is sufficiently set forth in the reported case, and it is sufficient to say that it is an industrial insurance act, similar to that of Washington, but includes a much larger number of employments. The act further provides that the employer shall secure the compensation to his employee either by insuring and keeping insured the payment of such compensation in the state fund or in a stock corporation or mutual association, or by furnishing satisfactory proof of his own financial ability to pay the compensation for himself.

The New York court has been severely criticized, particularly by laymen, for its decision in the *Ives Case*, and also for its supposed inconsistency in holding the first act void while sustaining the later act.

But whatever criticisms may be directed against the attitude of the New York court of appeals in the *Ives Case*, it may be well to note that no other legislature has passed a statute along the lines condemned in that case except the California statute discussed below and a majority of the supreme court of that state has said that the act would not be constitutional if it did not contain the industrial insurance idea. And it is probably safe to say that at the time the *Ives* decision was rendered, very few courts or students of constitutional law would have taken a contrary view of the abstract proposition that a statute imposing liability upon an innocent employer for injuries to an employee, received through no fault of the employer, is in violation of the constitutional provision guarantying due process of law.

A comparison between the purposes of the two New York statutes discloses a fundamental distinction justifying the ultimate conclusion of the court that the first act was invalid, while the second is sound as a valid exercise of the police power.

The statute condemned in the *Ives Case* reserved to an employee injured by the negligence of the employer the existing common-law or statutory remedies by action for damages, and consequently it might be said to be directly aimed at an employer whose employees were injured without fault upon his part. On L.R.A.1916A.

the other hand, the statute upheld in the *JENSEN CASE* applies to all employers engaged in the designated employments, whether negligent or otherwise, and thus presents an entirely new scheme regulating the payment of compensation to injured employees in the designated employments.

The first act merely imposed an additional burden upon the employer without fault. The second act, viewed as a whole, is in the nature of a give-and-take statute, in which certain benefits are given and taken away from both the employer and the employee, and, as a whole, was intended to remedy a condition which to many thoughtful persons had become intolerable. From this standpoint it may well be justified as an exercise of the police power; or at least there is a very marked distinction between it and the act held void in the decision in the *Ives Case*.

In its later decision the court distinguishes the two acts upon the ground that the first act made no attempt to distribute the burden, and subjected the employer to a suit for damages. But that the attitude of the New York court has changed somewhat at least is evident from its reliance upon the decision of the United States Supreme Court in the *Noble Bank Case*, which it was not disposed to follow in its decision in the *Ives Case*; but the court is entirely correct in saying that the two statutes are radically different. But, as has been stated above, the New York court in its first decision made no point of the peculiarities of the particular statute, but condemned it upon the general ground that the theory of making an employer liable where he had not been negligent was violative of the fundamental principles of due process.

In some respects the later act imposes greater burdens upon the employer than did the earlier act. Under the present statutes he is obliged to contribute to a fund which will compensate employees of all employers engaged in the same business, and his contributions to this fund are determined by the risk incurred by the employees in that business, and this contribution upon his part may be greatly in excess of what he would be obliged to pay if he had to compensate only his own injured employees.

From this point of view the second act would seem even more unjustifiable than the first, since there the employer was obliged to compensate only his own employees; but under the second act he is compelled to pay his contributions.



to the fund although none of his own employees are injured, and his contributions to the fund will be devoted to compensation of injured employees of other employers, and such injuries may in fact have been caused by the negligence of the other employers. This objection is suggested by the New York court in its decision in the Ives Case, although of course the act there under discussion did not contain this provision. The court there said: "Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health, and morals of his employees, is liable in damages to any employee who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employee himself." It is, however, to be noted that both the Washington and the Montana courts upheld their respective statutes against the contention that they did not differentiate between the careful and the careless employer.

As to the fundamental principle involved, it is certainly quite difficult to make a logical distinction between the theory condemned in the Ives Case, and the theory upheld in the JENSEN CASE. It certainly could be plausibly argued that the court in the latter case says that that may be done indirectly, which it had been previously said could not be done directly; and this view has been taken. In the dissenting opinion of Henshaw, J., in *Western Indemnity Co. v. Pillsbury* (Cal.) *infra*, in which he held that the California act was invalid, he contends that if the liability to pay compensation for injuries not caused by the employer's negligence is unauthorized, there can be no authority to compel an employer to insure himself against such invalid liability.

He said: "The Ives Case flatly, and, I think, correctly, held that the imposition of the liability did violence to the Constitution of the United States. The later decision [JENSEN CASE] does not in the least attempt to explain how the difficulty is obviated by an amendment of the state Constitution, but declares merely that the compulsory insurance made a part of the law places the whole law within the protective sanctuary of the Haskell Case. In a sense there is a similarity between the Haskell Case and the New York case. It appears in this: In the Haskell Case people who had

actually sustained loss were to be made good,—depositors in banks that failed. In the New York case, its law being addressed only to employees in hazardous occupations, it might be assumed, as has been said, that such employees were dependent on their wages, and thus in need of compensatory assistance, or they would not be engaged in such employments. But our law nowhere nor in the remotest degree exercises this amount of selection and discrimination, but bestows its bounty on all. But, more important still, I am utterly unable to perceive how a liability primarily illegal and void may be metamorphosed into a legal liability by a compulsory law requiring the employer to insure against it. Manifestly the insurance is not even designed for the employer's benefit, since he is subject to additional penalties if he does not insure, but for the benefit of the employee. The result, therefore, is but to impose another burden on the employer. He may be willing to take the risk of accidental injury. There may to his employees occur no such injury, but he is still obliged to pay out, by way of insurance, money exacted from him because the state had seen fit to threaten him with an illegal liability if he does not insure against that illegal liability. So I say the element of insurance is the importation into the discussion of a false and irrelevant quantity. If the primary liability is legal, it requires no appeal to the insurance provisions for its support. If it is not legal, then the argument is simply a declaration that an illegal liability is made legal because it may or must be insured against."

The later New York act professes to relieve an employer who fulfils its requirements from all other liabilities, but this is not true in those cases falling within the application of the Federal laws, as where an employee of an interstate carrier by rail is himself engaged in furthering such interstate commerce, and is injured by the negligence of the carrier; or where the property of the employer may be proceeded against in admiralty. Both of these situations have been before the New York court of appeals and the act has been sustained.

Thus, in *Winfield v. New York C. & H. R. R. Co.* (1915) — *N. Y.* —, 110 *N. E.* 614, the court upheld an award of compensation to an employee of an interstate railroad who, while himself engaged in furthering interstate commerce, was injured without fault on the part of the employer. This decision is put upon the ground that, as the em-

ployer was not negligent, the Federal act does not apply.

So, too, it has been held that the New York law, in granting exemption from further liability to employers who comply with it, does not deny equal protection in the case of employers whose property may be proceeded against in admiralty, since the exemption is from suit at common law, of which all employers complying with the act equally have the benefit. *Re Walker* (1915) — **N. Y.** —, 109 **N. E.** 604.

The decision of the United States Supreme Court upon this point will be awaited with interest.

The provision of § 21 of the New York act that, in any proceedings for the enforcement of a claim, it shall be presumed, in the absence of substantial evidence to the contrary, "(1) that the claim comes within the provision of the chapter," has been held not to infringe upon the due process of law guaranteed by the Constitution. *McQueeney v. Sutphen* (1915) 167 **App. Div.** 528, 153 **N. Y. Supp.** 554.

The last compulsory statute to be reviewed by the court is the California act of 1913 (*Stat.* 1913, p. 279). This act provides for direct payment; that is, the employer is required to compensate his employees for injuries actually received in the particular employment, instead of being required to pay certain sums into a state fund, or to provide insurance in other ways. The statute also declares that an employer who is insured against liability for the full amount of compensation payable or to become payable may be relieved of liability by giving certain notices to the parties interested.

This act was upheld in *Western Indemnity Co. v. Pillsbury* (1915) — **Cal.** —, 151 **Pac.** 398, but by a divided court. Three justices took the view that the act was constitutional in its entirety and that the legislature had authority, under the police power of the state, to pass an act making an employer directly responsible to his employee for the compensation imposed by the act.

In this opinion the following quotation is found: "The line is sharply drawn, however, by the New York court of appeals, between the fellow-servant and contributory-negligence rules, on the one hand, and the rule that fault on the part of the employer must be shown, on the other. Why this distinction? Is the latter doctrine any more sacred or inherently necessary than either of the former? Under the common law the

burden of industrial accident, where no fault was attributable to employer or workman, fell on the workman. Under the new law it falls, primarily, at least, on the employer. It cannot be said that the one rule or the other is a necessary or logical result of fundamental principles of justice. The very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own wilful misconduct, brought it upon themselves."

Three justices took the view, however, that if the act provided nothing more than that the damages suffered by the employee entirely from his own fault should be wholly paid by his blameless employer, the means for remedying the public evil would be oppressive and unreasonable, and that the law so declaring would be invalid; but that the law in question was valid because it proceeded to establish a state compensation insurance fund out of which such damages might be paid, and to which the employer might resort for his protection.

But *Henshaw, J.*, held that the act was invalid in that it imposed liability upon the employers who had been guilty of no breach of duty. The learned justice agreed on the one hand with the decision of the New York court of appeals in the *Ives Case*, and on the other hand with the supreme court of Washington in the *Clausen Case*. His position was that the New York court was unquestionably right, while the Washington act could be supported inasmuch as it applied to hazardous employments only, and that as there was no constitutional amendment of that state upon which the act was based, it could be referred to the police power of the state, and as it was a reasonable provision, it could be sustained simply upon the ground of its reasonableness as a method of the exercise of the police power.

In the opinion in which the California act in its entirety was upheld (and apparently the majority of the court agrees with these views), it is said that the compulsory act of that state was not invalid because it did not, like some of the other compulsory statutes, limit the



newly created scheme of compensation to specially enumerated industries selected as and declared to be extrahazardous in character. And it was further said that there was not any distinction so far as constitutional objections are concerned that could be based upon the fact that the California act imposes upon the employer a liability to compensate his employees for injuries actually received in a particular employment, while other statutes, as, for example, that of Washington, require employers to contribute sums proportioned to their pay roll, and graduated according to the nature of the industry, into a fund out of which all claims for compensation are to be paid. The court said: "The essential question is whether liability for injury suffered by employees through accident may be imposed upon employers who have been guilty of no breach of duty. Once this question is answered in the affirmative, the mode of imposing the liability, whether it be by way of a proportionate contribution having some of the characteristics of a tax, or by fixing a direct liability upon each employer for each accident as it occurs, is a matter for legislative determination."

Although the Iowa statute is optional, and consequently any discussion with reference to that act is not authority upon this point, some expressions of the Iowa supreme court clearly indicate that a compulsory industrial insurance act would be sustained against the contention that it took property without due process of law. In *Hunter v. Colfax Consol. Coal Co.* (1915) — *Iowa*, —, L.R.A.—, —, 154 N. W. 1037, the lower court had taken the view that the statute cut off from an employer who elected not to come in under the act, the privilege of showing that he had not been at fault. The language of the statute is ambiguous, and the supreme court held that the lower court was in error in so holding, and that had the statute taken away that privilege, it would have been unconstitutional. The court took the position, however, that if the act were compulsory, and should work an involuntary taxation on the employer, it would not be unconstitutional, since a scheme of insurance to secure injured workmen and their dependents from becoming objects of charity is for the public benefit in that it protects the public from the indirect charge levied upon it through the medium of litigation, support of the poor, etc., caused by the industrial loss. The court said: "Its requirement in case of acceptance con-

stitutes a proper exercise of the police power,—such exercise of it as would sustain compulsory acceptance."

In concluding this portion of the annotation, the suggestion may be made that, in view of the decisions of the Supreme Court of the United States and of the highest courts of Washington, Montana, New York, and California, upholding compensation acts taking the form of industrial insurance acts, and in view of the general disposition of the courts to recognize the weight of the argument of the New York court in the *Ives Case*, it is probable that workmen's compensation acts of the future will very generally provide for industrial insurance rather than for direct liability.

It is also well to bear in mind that both the direct liability statutes and the insurance statutes do take the property of an employer who is without fault, and devote it to private purposes. As a matter of policy, the latter statutes may be the more desirable or justifiable, but nevertheless there is, even in those statutes, a "taking." This can only be justified as an exercise of the police power of the state, and in the exercise of this power in the passage and enforcement of these statutes, the courts and legislatures will be continually confronted with what is probably the most fundamental principle of our government,—namely, a person's property may not be taken without due process of law.

#### **Class legislation.**

The statutes have been upheld against the contention that they are class legislation, this objection being based on several different grounds.

The Washington act is not invalid as class legislation because the fund collected by assessments of uncertain hazardous businesses is to be expended in the relief of employees of such businesses instead of being applied to the relief of workmen generally, or to the use of the state at large. *State ex rel. Davis-Smith Co. v. Clausen* (1911) 65 *Wash.* 156, 37 L.R.A.(N.S.) 466, 117 *Pac.* 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599.

The Ohio statute does not make an unlawful discrimination in providing that the state and each county, city, village, school district, or other taxing district, shall pay 1 per cent of the amount paid for services of employees during the last fiscal year into the state insurance fund, while all other persons and corporations subject to the operation of the act shall pay into the fund semi-annually the amount of premium deter-

mined and fixed by the state Liability Board of Awards, for the employment or occupation of such employer. *Porter v. Hopkins* (1914) — **Ohio St.** —, 109 N. E. 629.

In a number of cases it has been held that the statutes are not objectionable as class legislation because they apply only to employers employing a certain number or more of employees.

Employers having five or more employees are not denied the equal protection of the laws because their failure to comply with the terms of the Ohio workmen's compensation act by paying into the state insurance fund thereby created, the premiums required by that act, deprives them, in actions for damages, brought by their injured employees, of the defenses of contributory negligence, assumed risk, and the negligence of fellow servants, while those employing four or less employees are privileged to make either or all of these defenses. *Jeffrey Mfg. Co. v. Blagg* (1914) 235 **U. S.** 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, affirming 90 **Ohio St.** 376, 108 N. E. 465.

The Ohio statute is not void as making an arbitrary classification, since the risks of any regular employment are less and the opportunity for avoiding them better where an employee is one of four, than when the number of employees is larger. *State ex rel. Yapple v. Creamer* (1912) 85 **Ohio St.** 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30.

The Kansas act is not invalid as classifying employers with reference to the number of employees. *Shade v. Ash Grove Lime & Portland Cement Co.* (1914) 93 **Kan.** 257, 144 **Pac.** 249.

A statute is not invalid for unconstitutional discrimination, which abolishes the doctrines of fellow service and assumption of risk in actions to hold employers liable for negligent injuries to their employees, except in cases of persons employing less than four servants. *Borgnis v. Falk Co.* (1911) 147 **Wis.** 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649. The court said: "The man who is employed with one or two other men in a given employment in all reasonable probability knows their characteristics well, and will probably be with them a great part of the time. He will have ample opportunity to form a just judgment as to the risk of injury from their negligence which he will run if he works with them, and will be enabled to shape his own conduct accordingly; but the man who is one of a large number of men, many of whom he never

sees, and some of these latter having duties to perform in distant places, upon the due performance of which his own safety depends, has no opportunity to acquire any accurate knowledge of the characteristics of many of his fellow workmen, and cannot intelligently decide what risk he runs at the hands of such distant and unknown employees. The difference in situation is not merely fanciful; it is real. In one case the employee knows or has the means of knowing what to expect from his collaborators; in the other case, he has neither the knowledge nor the means of knowledge."

That a classification of employments into hazardous and nonhazardous employments is not arbitrary is well settled.

Thus, the application of a police measure to the work of erection or demolition of structures having iron or steel framework, operation of elevators in constructing or demolishing buildings, work on scaffolds or about electrical current or explosives, the operation of railroads, the construction of tunnels, and work carried on under compressed air, is not a denial of the equal protection of the law, as being an arbitrary classification. *Ives v. South Buffalo R. Co.* (1911) 201 **N. Y.** 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, **Ann. Cas.** 1912B, 156, 1 N. C. C. A. 517.

So, the Illinois workmen's compensation act of 1911 is not unconstitutional as class legislation because it applies only to employees in hazardous employments. *Deibeikis v. Link-Belt Co.* (1913) 261 **Ill.** 454, 104 N. E. 211, **Ann. Cas.** 1915A, 241, 5 N. C. C. A. 401. The court said: "These sections are meant to exclude anyone who may be occupying a mere clerical position and whose work is such that he is not subject to any of the hazards of the general business in which the employer is engaged. This is a proper and reasonable classification."

And the Kansas act is not invalid in classifying occupations with reference to the nature of business. *Shade v. Ash Grove Lime & Portland Cement Co.* (**Kan.**) *supra*.

The Montana statute is not unconstitutional as class legislation because it singles out the hazardous employment of mining and subjects it to burdens not placed upon other hazardous employments. *Cunningham v. Northwestern Improv. Co.* (1911) 44 **Mont.** 180, 119 **Pac.** 554, 1 N. C. C. A. 720.

But the legislature is not bound to make this classification, but may make



the statute applicable to all employments.

Thus, the Wisconsin statute is not invalid in taking away or abolishing the doctrine of assumption of risk and fellow service in the case of nonhazardous trades as well as in the case of extra-hazardous employments. *Borgnis v. Falk Co.* (Wis.) supra. The court said that while there was room for classification, it did not follow that legislation without the classification was unconstitutional.

The express exemption of certain employments, such as domestic service and farm labor, in which the hazards are very slight, is not an arbitrary classification.

The California statute is not unconstitutional as making an unreasonable classification by excluding from the operation of the act casual employees, and employees engaged in farm, dairy, and agricultural, viticultural, or horticultural labor, in stock or poultry raising, or household domestic service. *Western Indemnity Co. v. Pillsbury* (1915) — *Cal.* —, 151 Pac. 398. The court said: "That casual employees form a special class which might fairly be regarded as not requiring the protection of the new law is obvious enough, and is indeed not questioned by the petitioner. A more serious question is presented by the exclusion of employees in the various branches of agricultural pursuits and in domestic service. But here, too, in view of the very liberal rules established by our decisions on the legislative power of classification, it must be held that the lawmaking body might reasonably have found that the conditions of agricultural and of domestic employment were so far different from those surrounding other employments as to justify the limiting of the new compensation law to these other employments."

The Iowa act is not unconstitutional in arbitrarily excepting from the operation of the act household or domestic servants, farm or other laborers engaged in agricultural pursuits, and persons whose employment is of a casual nature. *Hunter v. Colfax Consol. Coal Co.* (1915) — *Iowa*, —, L.R.A.—, —, 154 N. W. 1037.

The Massachusetts act is not unconstitutional as exempting domestic servants and farm laborers from its provisions. *Re Opinion of Justices* (1911) 209 *Mass.* 607, 96 N. E. 308, 1 N. C. C. A. 557.

The Michigan act is not unconstitutional. L.P.A.1916A.

tional in that it exempts household servants, farm laborers, and casual employees from its provisions. *Mackin v. Detroit-Timkin Axle Co.* (1915) — *Mich.* —, 153 N. W. 49. The court said: "The law is unquestionable that it is within the power of the legislature to classify both employers and employees, if the classification is not fanciful or arbitrary, and for reasons of public policy is based upon substantial distinctions, is germane to the object sought to be accomplished by the act, not limited to existing conditions only, and applies impartially and equally to each member of the class."

Excluding domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are engaged in interstate commerce from the provisions of the workmen's compensation act does not render it unconstitutional as class legislation. *Mathison v. Minneapolis Street R. Co.* (1914) 126 *Minn.* 286, L.R.A.—, —, 148 N. W. 71, 5 N. C. C. A. 871.

It has also been held that making different provisions for those employers who do accept the act, and those who do not, is not unlawful.

The legislature, in putting employers who become subject to pt. 2 of the act in a different class from those who do not, and in abrogating the defenses of contributory negligence, assumption of risk, and coservice in actions against employers who do not accept such pt. 2, and permitting such defenses in actions against employers who do accept such pt. 2, does not render the act invalid as class legislation. *Mathison v. Minneapolis Street R. Co.* (*Minn.*) supra.

A statute is not invalid as conferring unequal privileges and immunities, which abolishes the doctrines of assumption of risk and fellow service in actions to hold employers liable for personal injuries to their servants, in cases where employers refuse to take advantage of the act, but preserves them intact to those who come under the law. *Borgnis v. Falk Co.* (Wis.) supra. The court, in speaking of the distinction between an employer who accepts the terms of the act and one who does not, said: "After all, there is another distinction which seems perhaps more satisfactory. The consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled

under our Constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid,—a difference which justifies a difference in treatment?"

Many of the optional statutes provide that in case the employer does not elect to come in under the act, he will be deprived of the common-law defenses; if the employee does not elect to come in under the act, these defenses will be open to the employer against the employee. The employee must meet these defenses under these existing laws, so that it would appear that while an employer who does not accept the act is not in as good a situation as under the prevailing laws, nothing is taken away from the employee who refuses to accept the act, but he is in precisely the same situation as under the existing laws. That this is an unjust discrimination against the employer has been contended in one case, but the court overruled the contention.

Thus, the Iowa act is not void as containing improper classifications and arbitrary differentiations in that the penalties imposed upon the master and the servants for rejecting the act are not precisely the same. *Hunter v. Colfax Consol. Coal Co. (Iowa)* supra.

#### Delegation of powers.

The optional acts are not unconstitutional as containing an invalid delegation of judicial power to the administrative board and officers created to enforce the act. *Hunter v. Colfax Consol. Coal Co. (Iowa)* and *Mackin v. Detroit-Timkin Axle Co. (Mich.)* supra; *Deibeikis v. Link-Belt Co. (1915)* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.

Providing for the submission to an administrative board of the questions of fact in case of a dispute as to the amount to be awarded an injured employee under a workmen's compensation act, which has power to award the amount due as provided by the statute, which award, under certain circumstances, may be reviewed by the courts, does not, where the jurisdiction of the Commission depends on the consent of parties, and the question of consent is subject to review by the courts, render the Commission a court, and the statute void on the theory that the legislature has no constitutional power to create

courts. *Borgnis v. Falk Co. (Wis.)* supra.

The Ohio act does not delegate judicial power to the board of awards; it is merely an administrative agency to bring into being and administer the insurance fund; and the fact that it is empowered to classify persons to come under the law, and to ascertain facts as to the application of the fund, does not vest it with judicial power within the constitutional sense. *State ex rel. Yapple v. Creamer (1912)* 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30.

And it has been held that the compulsory acts of Washington and Montana are not unconstitutional as delegating judicial power to administrative bodies or officials, since if, as the court had decided, the acts in the substantive portion were constitutional, then the method of carrying them into effect must also be considered as valid.

Thus, the Washington act is not unconstitutional in delegating judicial powers to the Industrial Insurance Commission. *State v. Mountain Timber Co. (1913)* 75 Wash. 581, L.R.A.—, 135 Pac. 645, 4 N. C. C. A. 811. The court said: "To uphold the law in the sense of sustaining the idea of industrial insurance, and to deny the right of executing it without the intervention of the courts, would throw us back on the original ground, and we should then, if consistent, hold the idea of industrial insurance to be beyond the limit of the police power."

So, in *Cunningham v. Northwestern Improv. So. (1911)* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, it was held that the act did not delegate judicial powers to the state auditor in intrusting the collection and distribution of the insurance fund to him. The court said: "Regarded as an act to provide a fund for the benefit of certain employees and their dependents who would otherwise be remediless we have no doubt that it is within the power of the legislative assembly to intrust the administration of the fund to such official as it may see fit." The court further said: "If the tax provided for in the act can legally be exacted from the employer, and, as is the case, the acceptance of its benefits by the claimant ipso facto operates to release the employer from liability, it is difficult to see how the latter has any further concern in the matter of the distribution of the fund than to be assured, as the act provides he may be, that it is not paid out on improper or fraudulent



claims. If the summary method of administration provided may not be resorted to, then one of the paramount reasons for this class of legislation must be entirely eliminated from consideration."

#### **Impairment of contract obligations.**

No contract right is impaired by making applicable to existing contracts which are to terminate in the future, an employees' indemnity act which gives the employees an option to take advantage of it, or to stand on their common-law right, under the contract, to maintain an action to redress an injury received in the employment. *Borgnis v. Falk Co. (Wis.) supra.*

A similar decision was rendered in *Troth v. Millville Bottle Works (1914) 86 N. J. L. 558, 91 Atl. 1031.*

The Minnesota statute, as applied to a contract of employment existing at the time when it came into existence, is not unconstitutional as impairing the obligation of such contract. *State ex rel. Nelson-Spellisey Implement Co. v. District Ct. (1915) 128 Minn. 221, 150 N. W. 623, following Mathison v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A. —, —, 148 N. W. 71, 5 N. C. C. A. 871.*

The supplement to the main act which was passed and approved on May 2d, 1911, and which provided that every contract of hiring now in operation, or made or implied prior to the time limited for the act to which the act is a supplement to take effect (July 4th, 1911), shall, after this act takes effect, be presumed to continue subject to the provisions of § 2 of the act, is not unconstitutional as impairing the obligations of a pre-existing contract, where the contract in question was entered into on the 23d day of May, and the injury occurred at 5 o'clock in the afternoon of July 4th. *Sexton v. Newark Dist. Teleg. Co. (1913) 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.*

The Iowa statute is not unconstitutional as impairing existing contracts, since it, by its terms, does not purport to cover existing contracts. *Hunter v. Colfax Consol. Coal Co. (1915) — Iowa, —, L.R.A.—, —, 154 N. W. 1037.*

The Ohio statute does not impair the obligations of contracts, since it does not affect contracts in existence and unexpired at the time it is put into operation by the employer. *State ex rel. Yapple v. Creamer (Ohio) supra.*

But the Washington court has held that the Washington act, although compulsory, is not unconstitutional as applied to hazardous employment, performed under contract entered into prior to the time that the act went into effect, *L.R.A.1916A.*

since all contracts are subject to the police power of the state. *State ex rel. Pratt v. Seattle (1913) 73 Wash. 396, 132 Pac. 45.*

#### **Right to contract.**

The free right to contract is not taken away by the optional acts.

Thus, the Illinois workmen's compensation act of 1911, being elective, and not compulsory, does not deprive the employee of his right to contract and his natural right of waiver. *Deibeikis v. Link-Belt Co. (1913) 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.*

The provisions in the Michigan act, making attorneys' and physicians' fees in accident claims adjusted under its provisions subject to the approval of the Industrial Accident Board, and providing that no payment under this act shall be assignable or subject to attachment or garnishment, or be held in any way for any debt, is not unconstitutional as limiting the right of contract in preventing the injured person from employing an attorney of his own choosing. *Mackin v. Detroit-Timkin Axle Co. (1915) — Mich. —, 153 N. W. 49.* The court said: "These restrictions in the act as applied to those who submit to its provisions by election certainly cannot be held unconstitutional. They were deemed by the legislature proper and necessary to safeguard the interests of the class for whose benefit largely this act to 'promote the welfare of the people of the state' was passed; they are germane to the purpose of the act, and, in the light of conditions previously existing in litigation over personal injuries to workmen of which courts of last resort have taken judicial notice in construing workmen's compensation acts, are beneficial and appropriate, if not essential, to an efficient administration of the law."

#### **Right to trial by jury.**

Optional acts are not unconstitutional as denying the employee a right to trial by jury. *Young v. Duncan (1914) 218 Mass. 346, 106 N. E. 1; Hunter v. Colfax Consol. Coal Co. (1915) — Iowa, —, L.R.A.—, —, 154 N. W. 1037; Sexton v. Newark Dist. Teleg. Co. (1913) 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.*

In the latter case, the court said: "Either party to the contract of hiring may preserve his right to trial by jury by electing to stand upon the provisions of § 1 of the act. If he chooses, on the contrary, to stand upon the provisions of § 2 of the act by not giving notice or

entering into an express stipulation in accordance with its terms, he has that option, and by exercising it by implication waives his right to a trial by jury."

Trial by jury may be waived. *Hawkins v. Bleakley* (1914) 220 **Fed.** 378.

The Illinois workmen's compensation act of 1911 is not invalid as depriving an employee of a right to trial by jury, since either party being aggrieved at the award of the board of arbitrators has the right to appeal to the courts of record, where the matter is heard *de novo*, and where either party has a right to demand a trial by jury. *Deibeikis v. Link-Belt Co.* (Ill.) *supra*.

The Ohio act does not deny recourse to the courts and trial by jury; if an employee elects to come in under the act, his agreement binds him in advance to submit questions of amount, etc., to some tribunal other than the court, and if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may, by filing an appeal and petition in the ordinary form, be entitled to trial by jury, the case proceeding as any other suit. *State ex rel. Yaple v. Creamer* (Ohio) *supra*.

The Iowa act is not unconstitutional in fixing with certainty the damages to be allowed in cases of specific injuries, such as the loss of an arm, leg, or eye. *Hawkins v. Bleakley* (Fed.) *supra*. The court said that many of the states for many years had had statutes fixing the liability with precision in cases of deaths, and in no case has any court held such statute invalid.

But in *Ives v. South Buffalo R. Co.* (1911) 201 **N. Y.** 271, 34 **L.R.A.**(N.S.) 162, 94 **N. E.** 431, **Ann. Cas.** 1912B, 156, 1 **N. C. C. A.** 517, the question whether the provision in the New York statute fixing the amount which the employer was to pay in cases in which he was liable to compensation was raised, but as there was a conflict in the views of the members of the court, and as the decision of this question was not necessary for the disposition of the case, it was not decided.

So, too, it has been held that the compulsory acts of Washington and Montana were not unconstitutional as denying trial by jury.

The Washington act is not unconstitutional as taking away the right of trial by jury guaranteed by the Federal Constitution, since that provision has no application to state courts or to prosecutions for the violation of state laws. *State v. Mountain Timber Co.* (1913) 75 **L.R.A.**1916A.

**Wash.** 581, **L.R.A.**—, —, 135 **Pac.** 645, 4 **N. C. C. A.** 811.

A statute fixing an indemnity to be awarded employees injured in hazardous occupations, to be administered by a commission, is not invalid as interfering with the right to trial by jury. *State ex rel. Davis-Smith Co. v. Clausen* (1911) 65 **Wash.** 156, 37 **L.R.A.**(N.S.) 466, 117 **Pac.** 1101, 2 **N. C. C. A.** 823, 3 **N. C. C. A.** 599.

The right of trial by jury is not infringed by the Montana statute; since the right to such trial by jury as was guaranteed by the Federal Constitution does not apply to state courts; and the right to trial by jury guaranteed by the Montana Constitution refers to the trial of cases, actions, or suits at law, and has no reference to claims against an indemnity fund, such as was provided for by the Montana act. *Cunningham v. Northwestern Improv. Co.* (1911) 44 **Mont.** 180, 119 **Pac.** 554, 1 **N. C. C. A.** 720.

#### Illegal use of taxing power.

The insurance scheme of the Iowa act is not invalid as an unauthorized use of the taxing power, since the act is optional. *Hunter v. Colfax Consol. Coal Co.* (1915) — **Iowa**, —, **L.R.A.**—, —, 154 **N. W.** 1037.

The Montana act, in imposing a tax for the purpose of paying compensation to injured employees in the coal mining industry, imposes it for a "public purpose notwithstanding the only beneficiaries thereof were the employees of the coal mines." *Cunningham v. Northwestern Improv. Co.* (Mont.) *supra*.

In a number of the so-called optional acts, the statute is made compulsory as to employees of the state and the political divisions thereof. In some cases the contention has been made that to require the state or its divisions to pay compensation for injuries to employees is a devotion of money paid by taxation to private purposes, but this contention has not prevailed.

Requiring municipal corporations to compensate all workmen injured in their employ does not require taxes to be levied for other than public purposes, or deprive taxpayers of their property without due process of law. *Borgnis v. Falk Co.* (1911) 147 **Wis.** 327, 37 **L.R.A.**(N.S.) 489, 133 **N. W.** 209, 3 **N. C. C. A.** 649.

The Ohio act of 1913, requiring the state, and each county, city, incorporated village, school district, or other taxing district, to pay into the state compensation fund 1 per cent of the amount expended by such state or division thereof, for services of employees during the pre-



ceding fiscal year, is not invalid as diverting public funds from the purpose for which they were levied and collected. *Porter v. Hopkins* (1914) — **Ohio St.** —, 109 N. E. 629.

An assessment levied on those conducting hazardous occupations to provide an indemnity fund for their employees is not within the constitutional provision requiring the taxes to be equal and uniform, since it is in the nature of a license tax. *State ex rel. Davis-Smith Co. v. Clausen* (**Wash.**) *supra*.

#### Miscellaneous objections.

The Washington workmen's compensation act is not unconstitutional as applied to interstate commerce by water, since Congress has in no way legislated in the premises. *Stoll v. Pacific Coast S. S. Co.* (1913) 295 **Fed.** 169.

The New York statute is not violative of the Federal Constitution in attempting directly to regulate or impose a tax or burden on interstate or foreign commerce, since it merely undertakes to regulate the relation between employers and employees in the state. *JENSEN v. SOUTHERN P. Co.*

As to the limitation of the applicability of the state compensation laws by Federal laws, see annotation, post, 461.

The Illinois workmen's compensation act of 1911 does not violate the inhibition of the Constitution against unreasonable search and seizure, since the act is elective, and not compulsory. *Deibeikis v. Link-Belt Co.* (1913) 261 **Ill.** 454, 104 N. E. 211, *Ann. Cas.* 1915A, 241, 5 N. C. C. A. 401.

In *Dragovich v. Iroquois Iron Co.* (1915) 269 **Ill.** 478, 109 N. E. 999, it was held that the Illinois act was not unconstitutional as being passed before the amendments thereto were actually printed.

An employees' compensation act is not invalid because it gives the employers the right to determine whether or not minors rightfully employed by them shall have the benefit of the act, in the same

way that they determine the matter for adult employees. *Borgnis v. Falk Co.* (**Wis.**) *supra*.

The provision of pt. 3, § 15, that the association in which the employer was insured, and which paid the compensation to the dependents, may enforce, in the name of the employee, or its own name, for its own benefit, the liability of the third person whose negligence caused the injury, is not beyond the power of the legislature to make, since the association was equitably entitled to the recovery. *Turnquist v. Hannon* (1914) 219 (**Mass.**) 560, 107 N. E. 443.

It has been held that the Texas act is not contrary to the public policy of that state (*Memphis Cotton Oil Co. v. Tolbert* (1914) — **Tex. Civ. App.** —, 171 S. W. 309, 7 N. C. C. A. 547); and that the act of New Jersey, being elective, is not repugnant to the public policy of New York (*Wasilewski v. Warner Sugar Refinery Co.* (1914) 87 *Misc.* 156, 149 **N. Y. Supp.** 1035).

Such parts of the Kentucky act as take from the personal representative or estate of the deceased employee, who left no dependent surviving him, any part of the compensation due such representative or his estate, and direct its payment into the workmen's compensation fund for the benefit of other people, is a violation of § 241 of the state Constitution. **KENTUCKY STATE JOURNAL Co. v. WORKMEN'S COMPENSATION BD.**

In the same case it was held that it was within the power and right of an employee to waive the constitutional provision that the general assembly should have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and consequently the provision of the compensation act that the employer and employee might contract to accept the provisions of the act, and waive any cause of action which the employee might have had against his employer, was not unconstitutional. **W. M. G.**

#### RHODE ISLAND SUPREME COURT.

MICHAEL PENDAR

v.

H. & B. AMERICAN MACHINE COMPANY.

(35 R. I. 321, 87 *Atl.* 1.)

#### Conflict of laws — injury in sister state — failure to preserve rights there.

An employee cannot maintain an action **L.R.A.** 1916A.

in one state to recover damages for injuries received in another state where the contract of employment was made, if, at the time he entered into his employment, he failed to comply with the requirements of the local statutes that he notify the employer, who carried an employers' liability insurance policy, that he intended to rely on his com-

**Note.** — As to the extraterritorial jurisdiction of workmen's compensation statutes, and conflict of laws with reference thereto, see annotation, post, 443.

mon-law rights, which failure the statute makes a waiver of the right to maintain a common-law action.

*For other cases, see Conflict of Laws, I. c, 1, in Dig. 1-52 N. S.*

(June 11, 1913.)

**E**XCEPTIONS by plaintiff to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action brought to recover damages for personal injuries alleged to have been received by plaintiff while an employee of defendant, which resulted in a verdict in defendant's favor. Overruled.

The facts are stated in the opinion.

**Mr. Thomas L. Carty** for plaintiff.

**Messrs. Boss & Barnefield**, for defendant:

It is the law of the place where the injury was sustained, and not the law of the place where the action may be brought, which alone determines whether there is or is not any right of action.

*O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; *Louisville & N. R. Co. v. Whitlow*, 105 Ky. 1, 41 L.R.A. 614, 43 S. W. 711; *Kimball v. Kimball*, 75 N. H. 291, 73 Atl. 408; *Alexander v. Pennsylvania Co.* 48 Ohio St. 623, 30 N. E. 69; *Beacham v. Portsmouth Bridge*, 68 N. H. 382, 73 Am. St. Rep. 607, 40 Atl. 1066; *Chicago, R. I. & P. R. Co. v. Thompson*, 100 Tex. 185, 7 L.R.A. (N.S.) 191, 123 Am. St. Rep. 798, 97 S. W. 459; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, 5 Am. Neg. Rep. 549; *East Tennessee, V. & G. R. Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. Supp. 942.

The Massachusetts statute bars and extinguishes the common-law right of action which otherwise the plaintiff might have had.

Opinion of Justices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557.

**Baker, J.**, delivered the opinion of the court:

This is an action at common law brought by Michael Pendar, of Central Falls, in this state, against the H. & B. American Machine Company, described in the declaration as "a corporation duly created and having a usual place of business in the city of Pawtucket, in said state." The declaration alleges, in L.R.A.1916A.

substance, that on the 20th day of July, 1912, at said Pawtucket, the plaintiff, while then and there employed by the defendant, and while then and there in the performance of his duties as such employee, in loading or unloading "a certain appliance, machine, or buggy, so called," and while in the exercise of due care, was injured in consequence of the negligence of the defendant corporation. The declaration contains two counts. The first alleges the buggy to be unsafe; the second, that the floor about the buggy was unsafe. To the declaration the defendant pleaded the general issue, and also a special plea, in which it says that the plaintiff ought not to recover because "the place where said plaintiff was employed as a servant by said defendant, and the place where said plaintiff entered upon and continued his said employment as said servant of said defendant, and the place where the plaintiff's said injuries, as alleged in the two counts of his said declaration, were sustained, was and is in the town of Attleboro, in the commonwealth of Massachusetts, and not within the limits of the state of Rhode Island; that under the law of said commonwealth of Massachusetts, in force at the time of the making of said plaintiff's said contract of employment, and also in force at the time when said plaintiff's said injuries were so sustained, if an employee of a 'subscriber' or of a holder of an insurance policy in a liability insurance company authorized to do business in said Massachusetts, insuring the employer's liability to pay compensation for liabilities as provided in part 2 of chapter 751 of the Acts of 1911 of the Massachusetts legislature, shall not have given his employer at the time of his contract of hire notice in writing that he claimed the right of action at common law to recover damages for personal injuries, such employee shall be held to have waived his right of action at common law; that at the time when said plaintiff so made his said contract of hire with said defendant, said defendant was, and continued to be up to the time when and after said plaintiff sustained his said injuries, a 'subscriber' and a holder of an insurance policy in a liability insurance company so authorized, insuring said defendant's liability to pay said compensation hereinbefore referred to; that before the time of said plaintiff's said contract of hire, the said defendant posted printed notice that it had provided for the payment of said compensation to injured employees at one of the principal entrances to said defendant's factory, where said plaintiff was later employed as aforesaid, and in each room thereof where labor was employed, which said notice said defendant so



maintained from the time of posting thereof up to and after the time when said plaintiff's said injuries were sustained; and that said plaintiff at the time of his said contract of hire, nor at any time thereafter, did not give to said defendant notice in writing that he claimed his right of action at common law to recover damages for personal injuries."

The plaintiff demurred to said special plea, and stated the grounds of his demurrer as follows: "(1) That so far as appears in or by said plea there is nothing that defeats the jurisdiction of this court over parties to said action. (2) That so far as appears in or by said plea there is nothing that defeats the jurisdiction of this court over the subject-matter of said action. (3) That so far as appears in or by said plea the law of the commonwealth of Massachusetts therein referred to does not extinguish the plaintiff's said right of action. (4) That so far as appears in or by said plea the law of the commonwealth of Massachusetts therein referred to does not bar the plaintiff from maintaining his said action."

And in the event that said demurrer should be overruled, the plaintiff filed his replication to said plea, setting up "that the place where the said plaintiff was employed as a servant by said defendant, and the place where said plaintiff entered upon and continued his said employment as said servant of said defendant, and the place where the said injuries as alleged in the two counts of his said declaration were sustained, was and is within the limits of the state of Rhode Island, and not in the commonwealth of Massachusetts."

The plaintiff's demurrer was overruled, and his exception noted. Hearing was had on the replication to the special plea, jury trial being waived, and there was decision for defendant, and plaintiff excepted thereto. The case is now before this court on plaintiff's bill of exceptions, which contains only the exception to the decision overruling plaintiff's said demurrer.

The important question raised by the demurrer is whether the Massachusetts law pleaded in this case, as applied to the facts set out in the special plea, extinguishes the plaintiff's right to maintain a common-law action for the injuries received by him, as alleged in his declaration, so that he is barred from maintaining the present action. It is the law of this state, and generally, that the law of the place where the injury was received determines whether a right of action exists. If under the *lex loci* there be a right of action, comity permits it to be prosecuted in another jurisdiction; but if under the *lex loci* no right of action is creat-

ed or exists, then it exists nowhere, and can be prosecuted in no jurisdiction. This doctrine has been recognized and accepted by this court in the case of *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244. That was an action brought for an injury received in Massachusetts resulting in death through defendant's negligence. It was not pleaded that the action survived under the law of Massachusetts. The court says: "The cause of action accrued in Massachusetts under and by virtue of the law in force there, and if under the law of that state the action no longer exists there, it no longer exists here. . . . It is not strict right, but comity, which enables a person who has been tortiously injured in one state, to sue for damages for the injury in another, and, of course, after the cause of action has become extinct where it accrued, it cannot, as a mere matter of comity, survive elsewhere." See also *Connor v. New York, N. H. & H. R. Co.* 28 R. I. 560, 562, 18 L.R.A. (N.S.) 1252, 68 Atl. 481, 13 Ann. Cas. 1033. This has been generally accepted as the law in such cases.

In *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, at page 176, 15 N. E. 230, the court says: "All the cases agree that, whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred. . . . Unless the alleged wrong was actionable in the jurisdiction in which it was committed, there is no cause of action which can be carried to and asserted in any other jurisdiction." See also *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803; *Turner v. St. Clair Tunnel Co.* 111 Mich. 578, 36 L.R.A. 134, 66 Am. St. Rep. 397, 70 N. W. 146, 1 Am. Neg. Rep. 270; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, 5 Am. Neg. Rep. 549; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815.

The situation is the same, although the act or omission to act might have been actionable if occurring in the jurisdiction of the forum. *Chicago, R. I. & P. R. Co. v. Thompson*, 100 Tex. 185, 7 L.R.A. (N.S.) 191, 123 Am. St. Rep. 798, 97 S. W. 459; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 196, 47 C. C. A. 615, 108 Fed. 116, 125. The exception to this is that under the principles of comity an action will not be permitted to be prosecuted, if it would violate the public policy of the forum.

It is obvious, therefore, that the right of the plaintiff to maintain this action in Rhode Island is determined by the fact as to whether or not he has such right in Massachusetts. The demurrer admits the law of Massachusetts to be correctly pleaded, and also admits, for the purpose of the hearing, the alleged statement of facts in the plea to be true. Upon such admissions it is evident that the plaintiff has waived in Massachusetts his right to bring and maintain a common-law action to recover for the injuries alleged in the declaration, by failing at the time of his said hiring to give notice in writing to the defendant that he claimed his right to bring such action. In other words, by such failure to give notice he made his choice of remedy, so that his right to maintain a common-law action for such injuries was relinquished and given up, and no longer exists. The terms of the law are explicit, and there is no ground to question that such is its plain purpose and meaning. If the act in question be constitutional, the plaintiff had, when the present action was brought, no right to maintain such action in Massachusetts, and therefore had no right of action in Rhode Island. But the provision of said act respecting the waiving of the right of action at common law in Massachusetts has been held to be constitutional by the supreme judicial court of that state in *Opinion of Justices*, 209 Mass. 607, 610, 611, 96 N. E. 308, 315, 316, 1 N. C. C. A. 557. The court says: "We see nothing unconstitutional in providing, . . . as is done in part 1, § 5, that the employee shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as therein provided. The effect of the provisions referred to is to leave it at the employee's option whether he will or will not waive his right of action at common law. . . . By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common-law rights. An employer who does not subscribe to the association will no longer have the right, in an action by his employee against him at common law, to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the act, and whose employer has become a subscriber to the association, an action no longer can be maintained for death under the employers' liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights."

L.R.A.1916A.

As workmen's compensation acts are of comparatively recent enactment, it is not to be expected that many court decisions can be found on the point here considered. However, the employers' liability act of New Jersey, which contains an optional provision similar to that in Massachusetts, has recently been considered by the supreme court of New York in *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. Supp. 942. Plaintiff brought a common-law action in New York to recover damages for injuries received in New Jersey. The defendants pleaded the New Jersey act, to which pleads the plaintiff demurred. The court in its opinion says: "This is a common-law action brought by the plaintiff, a servant, against his master, to recover damages for personal injuries sustained in the course of his employment in the state of New Jersey. The separate defenses are based on the workmen's compensation act of the state of New Jersey. . . . It is conceded that the act was in force at the time of the accident, and that ordinarily the liability of the defendants would be governed by the laws . . . of New Jersey. . . . The first separate defense in the answer sets forth that the provisions of the statute constitute a contract between the plaintiff and the defendants, whereby the plaintiff agreed to accept and the defendants agreed to pay a certain sum of money in case of injury occurring to the plaintiff while performing duties in the course of his employment; that each party agreed to waive all questions of the negligence of either, and to be bound solely by the terms of the statute . . . The New Jersey act is not a compulsory statute. It is a so-called optional or elective statute. . . . The statute . . . becomes compulsory only in the event that neither party disaffirms it. . . . The accident happened in the state of New Jersey, and as the liability of the defendants is governed by the law of that state I think that the demurrer should be overruled." The constitutionality of the New Jersey act was upheld by the supreme court of that state in *Sexton v. Newark Dist. Teleph. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.

We therefore reach the conclusion that the plaintiff is not entitled to bring and prosecute in this state the common-law action under consideration, as by his own act his right thereto has been extinguished in the state where the injury was received. His exception to the decision of the Superior Court overruling his demurrer is overruled, and the case is remitted to the Superior Court for the entry of judgment on the decision.



WASHINGTON SUPREME COURT.  
(In Banc.)

MICHAEL J. REYNOLDS, Appt.,

v.

HARRY L. DAY et al., Respts.

(79 Wash. 499, 140 Pac. 681.)

**Conflict of laws — actions on foreign cause — difference in systems.**

The maintenance of a common-law action for injury to an employee in another state is not prevented by the fact that a local statute has abolished civil actions for such injuries, and provided a system of industrial insurance to provide for them; at least where actions may still be brought for injuries occurring within the state which are not within the provisions of the statute, and also where the employer is in default in payments necessary to entitle him to the benefit of the statute.

*For other cases, see Conflict of Laws, I. e, 1, in Dig. 1-52 N. S.*

(May 6, 1914.)

**A**PPEAL by plaintiff from the judgment of the Superior Court for Spokane County in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by their negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Robertson & Miller and Corkery & Corkery** for appellant.

Messrs. **John H. Wourms and Graves, Kizer, & Graves**, for respondents:

A cause of action arising in one state will not be enforced in the courts of another state when there is substantial dissimilarity between the statutes of the two states governing the subject-matter.

St. Louis, I. M. & S. R. Co. v. McCormick, 71 Tex. 660, 1 L.R.A. 804, 9 S. W. 540; Ash v. Baltimore & O. R. Co. 72 Md. 144, 20 Am. St. Rep. 461, 19 Atl. 643; Dale v. Atchison, T. & S. F. R. Co. 57 Kan. 601, 47 Pac. 521, 1 Am. Neg. Rep. 46; Belt v. Gulf, C. & S. F. R. Co. 4 Tex. Civ. App. 231, 22 S. W. 1062; Whitford v. Panama R. Co. 23 N. Y. 465; Needham v. Grand Trunk R. Co. 38 Vt. 309; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Keep v. National Tube Co. 154 Fed. 121; Zeikus v. Florida East Coast R. Co. 144 App. Div. 91, 128 N. Y. Supp. 933; Gallagher v. Florida East Coast R. Co. 196 Fed. 1000; St. Bernard v. Shane, 201 Fed. 453; Walsh v. New York & N. E. R. Co. 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584.

**Note.** — As to the extraterritorial jurisdiction of workmen's compensation statutes, and conflict of laws with reference thereto, see annotation, post, 443.  
L.R.A.1916A.

Ellis, J., delivered the opinion of the court:

The plaintiff brought this action in the superior court of Spokane county to recover for personal injuries suffered by him, which injuries he alleges were caused by the negligence of the defendants while he was in their employ as a laborer in their mine in the state of Idaho. The amended complaint sets up an ordinary cause of action as at common law against a master for negligent injury to his servant. This is followed by the allegation: "That there is not any statute or law in the state of Idaho providing for compulsory or industrial insurance, and the plaintiff does not receive, under the laws of the state of Idaho, any benefits, insurance, or compensation on account of said injuries as provided for employees under the laws of the state of Washington." There is no allegation as to what is the law of the state of Idaho relating to the maintenance of such actions, save the inference arising from the allegation quoted that there is no statute covering the case. A demurrer was interposed upon the grounds that the court had no jurisdiction of the subject-matter, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the action dismissed upon the sole ground, as expressed in the court's order, that "the court has no jurisdiction of the subject-matter of the action." The plaintiff appealed.

There was apparently no opportunity given for further amendment of the complaint so as to set out more specifically the law of the state of Idaho, and it is manifest that, if the decision of the trial court is correct, an amendment in that particular would have been unavailing in any event. Moreover, it seems to be conceded in the respondents' brief that, for the purposes of this review, it will be assumed that the common law, as applied to actions of this character, prevails in the state of Idaho. Any other course would be obviously unfair, since if the court had overruled the demurrer on the jurisdictional ground, but sustained it on the ground of insufficiency of facts, the appellant doubtless would have secured leave to amend.

The respondents contend, and the trial court apparently held, that it is contrary to the public policy of this state to permit the maintenance of an action of this character, and that this policy will not be controlled by the rule of comity so as to permit our courts to entertain such an action upon a cause arising outside of this state.

It is asserted that a policy hostile to such an action as this is specifically declared in the 1st section of the industrial insurance act (Laws of 1911, p. 345). That section reads as follows: "The common-law system

governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman, and that little only at large expense to the public. The remedy of the workman has been uncertain, slow, and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous work, and their families and dependents, is hereby provided regardless of questions of fault, and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries, and all jurisdiction of the courts of the state over such causes, are hereby abolished, except as in this act provided."

In the absence of a statute declaring *in loco*, an action for personal injury is a transitory action, and may be brought wherever service can be had upon the person responsible for the injury.

"Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. . . . It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred." *Dennick v. Central R. Co.* 103 U. S. 11, 18, 26 L. ed. 439, 441. See also 40 Cyc. 105; 22 Am. & Eng. Enc. Law, 2d ed. pp. 1379, 1380.

Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state where the action is brought, nor contrary to abstract justice nor pure morals, nor calcu-

lated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions *ex contractu* and actions *ex delicto*. In all such cases, the right to recover is governed by the *lex loci*, and not by the *lex fori*. In an action where the injury occurred in Montana and the suit was brought in Minnesota, the laws of the two jurisdictions being different as to the measure and amount of recovery, the Supreme Court of the United States, in an opinion delivered by the present chief justice, quotes with approval from *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413, as follows: "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Everyday our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens,"—adding: "The contract of employment was made in Montana, and the accident occurred in that state, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*." *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 198, 199, 38 L. ed. 958, 960, 961, 14 Sup. Ct. Rep. 978, 981.

The supreme court of Illinois has clearly stated the same rule. "Actions not penal, but for pecuniary damages for torts or civil injuries to the person [or property], are transitory, and, if actionable where committed, in general, may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought." *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 135, 44 L.R.A. 410, 52 N. E. 951, 952, 5 Am. Neg. Rep. 549. See also *Stewart v. Baltimore &*



O. R. Co. 168 U. S. 445, 449, 42 L. ed. 537, 539, 18 Sup. Ct. Rep. 105; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *East Tennessee, V. & G. R. Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Story*, Conf. L. 8th ed. p. 845, note A; *Dicey*, Conf. L. Am. Notes, pp. 667, 668.

This rule applies even though the plaintiff could not have recovered had the injury occurred in the state of the forum. *Walsh v. New York & N. E. R. Co.* 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584.

Measured by these principles, is the spirit of the industrial insurance law so antagonistic to the common-law action as to warrant a denial of jurisdiction in our courts of a case such as this? There is nothing penal in the common-law action, nor any thing contrary to good morals or natural justice, nor is it, for any cognate reason, prejudicial to the general interests of our citizens. That the legislature did not so regard it is evidenced by its preservation in all cases save those for injury in "extra-hazardous work," and the permission of its application under certain conditions even in such cases.

The respondents' position is clearly and forcibly stated in their brief as follows: "The amended complaint leaves us somewhat in the dark as to what is the law of Idaho on the subject of compensation to injured workmen. It merely pleads that there is no statute in Idaho providing for compulsory or industrial insurance. No statute of Idaho governing the subject being pleaded, and, the state of the law there being not more specifically alleged, we presume that the courts will assume that the common law prevails in Idaho. Now the common-law system of compensating injured workmen is particularly and eo nomine condemned by the industrial insurance act. It is declared 'to be economically unwise and unfair.' It is said that 'its administration has produced the result that little of the cost of the employer has reached the workmen, and that little only at large expense to the public.' Because of the unwisdom of the common-law system in that behalf, the state of Washington, it is declared, has withdrawn the compensation of injured workmen 'from private controversy,' and has abolished 'all civil actions and civil causes of action for such personal injury and all jurisdiction of the courts of the state' thereover. If this L.R.A.1916A.

be not the declaration of a policy utterly antagonistic and opposed in its every notion and theory to the common law, it is impossible to frame such a declaration."

Conceding the premises with the exceptions made by the statute itself, the conclusion does not follow. The hostility of our law is not directed against the remedial purpose of the common law. It extends that purpose to cases not reached by the common-law action. The rule of the common law is condemned, not because it furnishes a remedy, but because the remedy is deemed inadequate. This is far from a declaration of policy which would refuse that remedy where that remedy is the only alternative. There is nothing in the employers' liability act so hostile to the common-law remedy as to deny any remedy where the circumstances will permit the application of no remedy save that of the common law. The assertion that our law declares a policy "utterly antagonistic and opposed in its every notion and theory to the common law" is more rhetorical than exact. It is true only in a qualified sense. Our law is not opposed to the common-law theory of recompense for injury. It is only opposed to the common-law assumption that a suit at law furnishes adequate recompense. Such a policy is certainly not contrary to the giving of any remedy merely because the only remedy possible is deemed inadequate. Our statute was never intended to declare that, because workmen injured in this state receive compensation without suit, it is against the public policy of this state that workmen injured outside of the state, and where the common law prevails, should receive any compensation.

The expense to our taxpayers and the inconvenience to our courts which would result from entertaining suits upon causes of action arising in other jurisdictions is advanced as another reason why the rule of comity should not prevail in such cases. It is pointed out that one of the motives for the passage of the industrial insurance act was to avoid the expense imposed by the operation of the common-law system of compensation. It is claimed that this policy is shown in the preamble of the act, where it is said that the administration of that system has been "at large expense to the public." To our minds this hardly justifies the respondents' conclusion. Such actions are still maintained in this state, where the cause of action arises in this state, even in cases falling within the purview of the industrial insurance act, when the employer is in default in any payment due from him

to the accident fund. Industrial Insurance act, § 8; Laws 1911, p. 362 (3 Rem. & Bal. Code, §§ 6604-8). In *State ex rel. Baker River & S. R. Co. v. Nichols*, 51 Wash. 619, 621, 99 Pac. 876 (though, as there indicated, the question of comity was not really involved, but only a question of statutory construction), it was pointed out that public policy is dependent upon our own laws, while comity is based upon the laws of other states or countries. In that case it is well stated that "comity depends not alone upon a disposition to favor the citizen of another state or country, but rests upon well-settled principles of practice, expediency, and convenience. It is a rule recognized by courts and applied within bounds of discretion. It is based upon the statute law or decisions of courts of general jurisdiction of other states or countries, rather than upon our own. These will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state."

Unquestionably, before the industrial insurance act was passed, our courts would have entertained this action under the rule of comity so defined. Can it be said with any show of reason that, because our courts have been relieved of much of this character of litigation when arising between our own citizens and on causes originating in our own state, there is now such an overpowering inconvenience as to make it inexpedient to entertain jurisdiction of a cause of action arising in another state which would have been entertained but for that relief? Every trial of a case of which jurisdiction is taken by comity adds just that much to the burden of taxation. That fact, however, is only valid as an argument against the indulgence of the principle of comity in any case. It has no peculiar application to cases of this kind.

There is another consideration which presents an insuperable obstacle to the respondents' position. In order to make the common-law remedy so contrary to the public policy of this state that it will not be enforced as a matter of comity, it must appear that the common-law remedy will never be enforced under any circumstances where the cause of action arises in this state between our own citizens. We again impress the fact that the common-law action may still be maintained and its remedy enforced as against an employer in this state in all cases not specifically covered by the industrial insurance act. Moreover, the industrial insurance act, upon which the respondents re-

ly as the sole manifestation of a public policy of this state inimical to the common-law action, expressly excepts cases where the employer is in default in his contribution to the statutory insurance fund. We have held that such payment is a matter of affirmative defense which must be pleaded and proved in order to defeat an action at law against the employer for injury to his employee. *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370, 5 N. C. C. A. 557. This negatives any such hostility of our public policy to the common-law action, even in cases arising in this state and within the purview of the act, as to override the rule of comity in favor of a cause of action arising in a jurisdiction where there is no statute creating such a fund or providing any other remedy than that of the common law. To construe our statute as declaring such a public policy as that claimed would, aside from any rule of comity, render it subject to the ban of § 2, art. 4, of the Federal Constitution. It would deny to the citizens of other states the same privileges which it accords to our own citizens in like circumstances.

"In the decision of the merits of the case, there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution." *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34, 35. See also *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Corfield v. Coryell*, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230.

The legislature never intended the act in question to infringe the broad rule of comity as heretofore recognized by the highest courts both state and Federal. To give the act that effect would wantonly endanger its constitutionality.

The judgment is reversed, and the cause is remanded, with direction to permit an amendment of the complaint so as to plead the law of Idaho applicable in such a case, and for further proceedings.

**Crow, Ch. J., and Main, Gose, Parker, and Fullerton, JJ., concur.**



**CONNECTICUT SUPREME COURT OF ERRORS.**

SOPHIA KENNERSON, Admr., etc., of  
Wallace J. Hodges, Deceased,  
v.

THAMES TOWBOAT COMPANY.

MARCIA S. MARSDALE, Admr., etc.,  
of George Marsdale, Deceased,  
v.

SAME.

(89 Conn. 367, 94 Atl. 372.)

**Master and servant — appeal from Compensation Commission — questions open.**

1. The court cannot, upon appeal from a compensation commissioner, retry the facts, but inquires into them merely to determine whether the award is unauthorized in law, irregular or informal, or based upon a misconception of the law, or of the powers or duty of the commissioner, or is so unreasonable as to justify judicial interference.

*For other cases, see Appeal and Error, VII. 1, 4, in Dig. 1-52 N. S.*

**Courts — jurisdiction — action arising on high seas.**

2. A provision for compensation for injuries, made part of a contract of employment between citizens of the state, which is to be executed in part upon the navigable waters outside the jurisdiction of the state, may be enforced in the state courts, notwithstanding the injury occurred outside the state, and within the jurisdiction of the admiralty court.

*For other cases, see Courts, IV. d, in Dig. 1-52 N. S.*

**Master and servant — workmen's compensation — injury on navigable water.**

3. An exception in a state employer's liability act of injuries arising in interstate or foreign commerce does not apply to a death caused by the foundering of a tug without negligence on navigable waters of the United States.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — injury outside of state — applicability of statute.**

4. Provision for compensation for injuries to employees, occurring outside the state, in a contract for employment between citizens of the state, is authorized by a workmen's compensation act designed to apprise employer and employee of the recovery to be had in case of industrial accidents, the language of the statute being

**Note.**—As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to the extraterritorial effect of state workmen's compensation acts and conflict of laws, see annotation, post, 443.  
L.R.A.1916A.

general, equally applicable to injuries occurring within and without the state.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Statute — workmen's compensation act — construction — extraterritorial effect.**

5. A provision of a workmen's compensation act that each commissioner has jurisdiction of all claims arising in his district does not show intention that the act shall not apply to injuries arising in other states, under contracts between citizens of the state, since the claim may be said to arise at the domicile of the parties injured.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — mandatory provision — place for filing award.**

6. A provision in a workmen's compensation act that awards shall be filed in the office of the clerk of the court for the county in which the injury occurred should not be given a mandatory construction, so as to prevent applicability of the act to injuries arising out of the state, under contract made in the state, between its citizens.

*For other cases, see Statutes, II. a, in Dig. 1-52 N. S.*

**Same — provision for appeal — place where injury was sustained.**

7. A provision in a workmen's compensation act, which allows employer and employee to contract for compensation in case of injury, that an appeal from the commissioner's award may be had to the "superior court for the county in which the injury was sustained," does not prevent the application of the act to an injury occurring out of the state, under contracts made within it, since the injury may be said to have been sustained in the place where the contract was made.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Master and servant — injury — dependency — findings of commissioner — conclusiveness.**

8. The question of dependency of claimant for death of an employee under a workmen's compensation act is settled by the findings of the commissioner, in the absence of anything to indicate error of law in making the findings, or drawing conclusions from them.

*For other cases, see Appeal and Error, VII. 1, 4, in Dig. 1-52 N. S.*

(June 10, 1915.)

**R**ESERVATION by the Superior Court for New London County for the consideration of the Supreme Court of Errors of questions arising upon appeal by defendant from the awards by the Commissioner of compensation to plaintiffs, in proceedings by them to recover for the death of their sons. Judgments dismissing appeals advised.

Statement by **Wheeler, J.:**

The decedents, Wallace J. Hodges and George Marsdale, were citizens of Connecticut. The respondent, the Thames Towboat Company, was and is a Connecticut corporation located in New London, Connecticut. Contracts of employment, entered into in New London, existed between the respondent company and Hodges, decedent of Kennerson, administratrix, and Marsdale, decedent of Marcia S. Marsdale, administratrix, under which decedents' employment upon respondent's towboats was to be in Connecticut and on waters of the high seas, and of other states. Both decedents and the respondent had accepted the provisions of part B of the workmen's compensation act. The decedents were, on the 15th day of April, 1914, drowned in Raritan bay, near South Amboy, New Jersey, by the foundering of the tug on which they were employed; their deaths arising out of and in the course of their employment.

Said Wallace T. Hodges left surviving him two sisters under eighteen, a married sister, and a mother, claimant herein. He had given his mother for upwards of ten years half of his earnings, or \$20 a month. His mother used the sums so contributed for her own support and that of her minor children. She also received other support from her husband, who earned \$50 a month. None of the other children contributed to their mother's support.

Said George Marsdale left surviving him two brothers, a sister, and a mother, claimant herein. He had, during the illness of his father, sent his mother from July until his father's death, November 10, 1913, \$10 a week of his weekly wages of \$15. After her husband's death the mother went to live with her son Charles temporarily, and on December 9, 1913, the decedent engaged in said employment with the respondent for \$20 a month and his board, worth \$.50 a day. Out of his earnings the decedent gave his mother from \$20 to \$25 a month, which sums were to pay the funeral expenses of her husband. These were just paid prior to George's death. The mother and decedent had arranged that as soon as the funeral expenses were paid, her residence with her son Charles should cease, and they should then live together, and the decedent should support his mother. Except as stated, none of the children contributed to the support of their mother.

From the foregoing facts the commissioner found that Mrs. Kennerson, the mother of Wallace T. Hodges, was a partial dependent of her son Wallace, and that Mrs. Marsdale, the mother of George Marsdale, was a total dependent of her son George. L.R.A.1916A.

**Mr. Christopher L. Avery**, for claimants:

The workmen's compensation act does not violate the 14th Amendment to the Constitution of the United States, or any provision of the Bill of Rights of the state of Connecticut.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Opinion of Justices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Crooks v. Tazewell Coal Co. 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304, 5 N. C. C. A. 410; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Dietz v. Big Muddy Coal & I. Co. 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.—, 148 N. W. 71, 5 N. C. C. A. 871; Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547; Shade v. Ash Grove Lime & Portland Cement Co. 93 Kan. 257, 144 Pac. 249.

The claim of the defendant that the admiralty jurisdiction is exclusive is without foundation.

Schoonmaker v. Gilmore, 102 U. S. 118, 119, 26 L. ed. 95; Leon v. Galceran, 11 Wall. 185, 187, 20 L. ed. 74, 75; Manchester v. Massachusetts, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559; Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 648, 44 L. ed. 921, 926, 20 Sup. Ct. Rep. 824; The Belfast, 7 Wall. 624, 644, 19 L. ed. 266, 272; The Hine v. Trevor, 4 Wall. 555, 571, 18 L. ed. 451, 456; Murray v. Pacific Coast S. S. Co. 207 Fed. 692.

No action will lie in admiralty under the general maritime law to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence. Such a right of action may, however, be created by statute, either Federal or state.

The Harrisburg, 119 U. S. 199, 213, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; The Albert Dumois, 177 U. S. 240, 259, 44 L. ed. 751, 761, 20 Sup. Ct. Rep. 595; Work-



men v. New York, 179 U. S. 552, 563, 45 L. ed. 314, 321, 21 Sup. Ct. Rep. 212.

A state may create a right of action for injuries resulting in death to its citizens on its own vessels while at sea, and a proceeding under such a state statute may be maintained either in the state court or on the law side of a Federal court, where the necessary diversity of citizenship exists, or in admiralty, in an action in personam.

*American S. B. Co. v. Chase*, 16 Wall. 522, 532, 533, 21 L. ed. 369, 372; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 403, 52 L. ed. 264, 269, 28 Sup. Ct. Rep. 133; *Cornell S. B. Co. v. Fallon*, 102 C. C. A. 345, 179 Fed. 293; *Schuede v. Zenith S. S. Co.* 216 Fed. 566.

Constructively the tug "Aries," at the time of the accident, was to be considered as in law a part of the territory of the state of Connecticut (the state where the owners belong), and all persons on board, as to their relations with each other, were subject to, and to be governed by, the laws of the state of Connecticut.

1 Kent, Com. 158; *Wilson v. McNamee*, 102 U. S. 572, 574, 26 L. ed. 234, 235; *United States v. Rodgers*, 150 U. S. 249, 260, 37 L. ed. 1071, 1075, 14 Sup. Ct. Rep. 109; *Wildenhus's Case (Mali v. Keeper of Common Jail)* 120 U. S. 1, 12, 30 L. ed. 565, 567, 7 Sup. Ct. Rep. 383; *Patterson v. The Eudora*, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; *Thompson Towing & Wrecking Assn. v. McGregor*, 124 C. C. A. 479, 207 Fed. 209; *Reg. v. Anderson*, L. R. 1 C. C. 161; *The Bee*, 216 Fed. 709; *Manning v. International Mercantile Marine Co.* 129 C. C. A. 453, 212 Fed. 933; *Schweitzer v. Hamburg-American Line*, 78 Misc. 448, 138 N. Y. Supp. 944, affirming 149 App. Div. 900, 134 N. Y. Supp. 812; *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121.

The Connecticut compensation act is based upon the theory of contract. The relationship being contractual, the law of the place where the contract is made governs the parties thereto, irrespective of the place where the accident happens.

*Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 245; *Tennessee Coal, I & R. Co. v. George*, 233 U. S. 354, 361, 58 L. ed. 997, 1000, L.R.A.—, —, 34 Sup. Ct. Rep. 587; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Wasilewski v. Warner Sugar Ref. Co.* 87 Misc. 156, 149 N. Y. Supp. 1035; 1 *Bradbury, Workmen's Compensation*, 2d ed. pp. 34–59.

In both cases the finding of the commis-

sioner on the question of dependency is conclusive, and ought not to be disturbed by the superior court.

*Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 245; *Rintoul v. Dalmeny Oil Co.* 45 Scot. L. R. 809, 1 B. W. C. C. 340; *McLean v. Moss Bay Hamatite Iron & Steel Co.* 3 B. W. C. C. 402; *Hodgson v. West Stanley Colliery* [1910] A. C. (H. L.) 229, 79 L. J. K. B. N. S. 356, 54 Sol. Jo. 403, 47 Scot. L. R. 881, 102 L. T. N. S. 194, 26 Times L. R. 333, 3 B. W. C. C. 260.

Messrs. **Hull, McGuire, & Hull**, for respondent:

The compensation act of Connecticut has no extraterritorial effect.

*Tomalin v. Pearson & Son* [1909] 2 K. B. 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477; *Hicks v. Maxton*, 124 L. T. Jo. 135; *Schwartz v. India Rubber, Gutta Percha & Teleg. Works Co.* [1912] 2 K. B. 299, 81 L. J. K. B. N. S. 780, 106 L. T. N. S. 706, 28 Times L. R. 331, 5 B. W. C. C. 390; *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, 7 N. C. C. A. 144; *The Fred E. Sander*, 208 Fed. 724, 4 N. C. C. A. 891.

The district court of the United States has sole and exclusive jurisdiction of an action, if any there be, arising out of the deaths in these cases.

*American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *Schuede v. Zenith S. S. Co.* 216 Fed. 566; *Norwich & N. Y. Transp. Co. v. Wright*, 13 Wall. 104, 123, 20 L. ed. 585, 591; *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *The Fred E. Sander*, 208 Fed. 724, 4 N. C. C. A. 891; *Berton v. Tietjen & L. Dry Dock Co.* 219 Fed. 763; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; *The Bee*, 216 Fed. 709.

The New Jersey compensation act applies to injuries received in New Jersey.

*American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, 7 N. C. C. A. 144; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620.

The burden of proving dependency must be upon the claimant. It should be proved by clear and satisfactory evidence, and not left to conjecture or guess.

*Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 249; *Pinel v. Rapid R. System*, — Mich. —, 150 N. W. 897.

Wheeler, J., delivered the opinion of the court:

The reservation raises three questions for decision: (1) Whether recovery under the compensation act may be had for the injury resulting in the death of these decedents; (2) whether the claimants, or either of them, were entitled to compensation under the act; and (3) what judgment should be rendered by the superior court.

Before proceeding to the discussion, it is well to restate the position before the superior court of appeals from the finding and award of a compensation commissioner. The compensation commissioner is an executive officer engaged in administrative duties. The superior court cannot, on appeal, retry the facts. It inquires into the facts merely to determine whether "the finding and award . . . appealed from are unauthorized in law, irregular or informal, or based upon a misconception of the law, or of the powers or duty of the administrative tribunal, or are so unreasonable as to justify judicial interference." If it so finds, it will set aside the award; otherwise it will dismiss the appeal. *Hotel Bond Co's Appeal*, 89 Conn. 143, 93 Atl. 245.

The accident resulting in the death of Hodges and Marsdale, for which compensation is claimed under our compensation act, occurred in the waters of Raritan bay; whether on the high seas or within the navigable waters of New Jersey, the record does not distinctly specify. The parties on the argument have agreed that it occurred in the navigable waters of New Jersey, and we shall so assume. The decedents and the respondent were citizens of Connecticut. The contracts of employment between them were made in Connecticut, to be performed partly within and partly without the state.

The parties to each contract had accepted the provisions of part B of our workmen's compensation act. As a consequence, the act became a part of these contracts, part consideration of which was the promise of the employer to pay the compensation for injury provided by the act, and the promise of the employee to accept such compensation in full for all rights and claims arising out of injuries sustained in the course of his employment. The relation arising between these employers and employees was that of contract. Recovery was not dependent upon the fault of the employer, but upon the terms of the contract made. Acceptance of the act, whether made expressly or impliedly, as permitted by the act, made its provisions a part of these contracts of employment. The significance of the contract relation is foundational in the consideration of these cases, as, indeed, it must be *L.R.A.1916A*.

in the consideration of many of the questions likely to arise under any compensation act contractual in character.

Since the injury for which compensation is sought occurred in the navigable waters of New Jersey, the respondent insists that the admiralty court has exclusive jurisdiction. Maritime torts, contracts, and claims are cognizable in admiralty. Torts depend on locality; contracts and claims, upon their character. As to in rem actions, the jurisdiction of the admiralty court is exclusive. As to personal actions, it is not.

The clause in the judiciary act of 1789, now § 256, chap. 231, act March 3, 1911 (the Judicial Code of the United States), "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it" [36 Stat. at L. 1161, Comp. Stat. 1913, § 1233], was inserted in order to make clear that the grant of judicial power to the United States in all cases of admiralty did not deprive the suitor of his common-law remedies. The common-law remedies do not mean remedies in the common-law courts. They embrace all methods of enforcing rights and redressing injuries known to the common or statutory law. Our state courts have, from the beginning, enforced remedies to redress torts and sustain rights arising under contracts, and their jurisdiction so to do has been from the earliest time an established judicial fact. *The Hine v. Trevor*, 4 Wall. 555, 567, 18 L. ed. 451, 455.

The jurisdiction of the state courts over torts occurring on that part of the sea not under the control of a state is admitted. *Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. ed. 97, 105. And likewise for a similar reason the jurisdiction of the state courts over torts occurring in the navigable waters of the state is established. *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 403, 52 L. ed. 264, 269, 28 Sup. Ct. Rep. 133. If this proceeding were one to secure a recovery for a tort, the place of the injury would determine the right of recovery. *Pendar v. H. & B. American Mach. Co.* 35 R. I. 321, ante, 428, 87 Atl. 1, 4 N. C. C. A. 600. The attempt in this proceeding is to secure, through a procedure prescribed by statute, recovery of compensation for injury under a contract authorized by statute.

The contract in question may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is oper-



ative by the procedure of the state of its origin. This contract is to be interpreted and enforced by the application of the same principles accorded any contract. A contract for work to be done, or services to be performed, or goods to be delivered, in a jurisdiction other than the place of contract, is as enforceable in the state where the contract was made as in that where it was to be performed, unless the contract be against the law or the public policy of that jurisdiction, or its legal machinery is inappropriate or inadequate to its enforcement. Plainly, this proceeding is a personal action, and not one in rem. The admiralty court has not exclusive jurisdiction. *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 643, 648, 44 L. ed. 921, 924, 926, 20 Sup. Ct. Rep. 824; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95; *Leon v. Galceran*, 11 Wall. 185, 20 L. ed. 74; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *The Hine v. Trevor*, 4 Wall. 555, 567, 568, 18 L. ed. 451, 455; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559.

Again, it is insisted that an action for the injury in question is given in the admiralty court, and hence, under § 40 of the compensation act, it does not apply to this case. By this section the liability must have occurred in interstate or foreign commerce. There is nothing in the record to indicate whether the injury occurred while the employee was engaged in interstate or foreign commerce. If this be disregarded, it is still manifest this section has no application. The laws of the United States do not provide for compensation such as this contract gives, nor for a recovery for death or injury not predicated upon fault. Congress has not as yet legislated in regard to injuries occurring in interstate commerce by water; the state therefore may. *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169.

Presumably § 40 and similar provisions in other compensation acts have reference to the Federal employers' liability act. Where the injury arises from a cause not covered by the Federal act, this section does not apply. To come within the Federal act there must be interstate traffic, interstate employment, and negligence. Though the first two conditions be present in this proceeding, the latter is not. Note to 6 Negligence and Compensation Cases, anno. p. 920. It is not claimed, nor do we see how it could be with success, that a state may not provide that contracts of employment entered into within its bounds may include compensation for injury arising out of and in the course of the employment in another jurisdiction. *J. R. A. 1916A.*

We come, then, to the next question,—whether our compensation act provides for compensation for injuries received outside our state, and arising out of and in the course of the employment. The respondent insists that our act has no extraterritorial effect. That is not the precise question to be determined, but, rather, whether our act provides for compensation arising out of a contract of employment authorized by our act, for injuries suffered without our jurisdiction. If our act authorizes such a contract, recovery may be had; otherwise not.

Unless the intention to have a statute operate beyond the limits of a state is clearly expressed or reasonably to be inferred from the language of the act, or from its purpose, subject-matter, or history, the presumption is that the statute is intended to have no extraterritorial effect. A like presumption should control the operation of a contract based upon a statutory authority.

We find no clearly expressed intention in our act that the contract authorized should operate without the state. If found in the act, it must be found as an inference reasonably to be inferred from the language of the act, read in the light of its purpose, subject-matter, and history. In our search for such an intention it is all important that we do not forget the remedial character of the act, and that we construe its provisions broadly and liberally "in order to effectuate its purpose." *Hotel Bond Co's Appeal*, 89 Conn. 143, 93 Atl. 245-247.

The remedy provided by our compensation act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost in the case of every injury not caused by the wilful and serious misconduct or intoxication of the injured employee to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our juris-

diction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the state, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the state, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The state boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employee since he must pursue his remedy in the state of the accident, or the Federal court applying that state's law, and thus he may be brought under any one of many different compensation acts, with whose provisions he cannot hope to be familiar, some acts contractual in character, some compulsory, some optional, and some *ex delicto*, and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities.

Is it reasonable to infer that our legislature, inaugurating a new system, based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system, and cast a multitude of employers and employees into a maelstrom of trouble, uncertainty, and liability? On the other hand, is it not reasonable to infer that the legislature, having bottomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed to have known that the contract, and not the place of injury, would govern the recovery. Such a construction of the act would lift insuperable burdens from industry and commerce and workmen, and give to each his course and the ascertained fruits of the contract of his will. Whether the contract shall include injuries in a jurisdiction other than where the contract was made is determined by the expressions or implications of each act.

Section 1, pt. A, of our act, recites that, "in an action to recover damages for per-

sonal injury," certain defenses shall not be available. Here is no limitation to injuries received within the state. We, through comity, enforce actions for injuries received outside the state when not against our law or public policy. The natural construction of this language makes it include every action, wherever it originates.

Section 1, pt. B, recites that when employer and employee have accepted part B, the employer shall not be liable to any action for damages for personal injury sustained by his employee in the course of his employment, but the employer shall pay compensation on account of such injury, as provided by the act. Do not the words "any action" mean what they say? And have we any more right to insert after them "within the state" than "within or without the state?" In this section the acceptance of the act is, by its express terms, a renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment, except as specified. It seems to us plain that the rights and claims waived are not merely those arising in Connecticut, but anywhere.

In § 8, pt. B, compensation is required to be paid for "any injury" which incapacitates for more than two weeks. There is no warrant for construing "any injury" to consist of one arising within the state.

By § 20 every employer who has accepted part B "shall keep a record of such injuries sustained by his employees in the course of their employment . . . and . . . send each week to the commissioner such report of said injuries as the commissioner shall require." It cannot be that the record intended was solely of the injuries happening within the state. Obviously it was intended to embrace all injuries occurring to such employees everywhere; any other construction would do violence to the ordinary meaning of the word used and to the manifest purpose in keeping the record.

Similarly the notice of injury of § 21, and the voluntary agreement of § 22, relate to every injury, and not merely those occurring within the state.

Under § 29 any employer may enter into a substitute system of compensation with his employees in lieu of the compensation of the act. The legislature had the undoubted power to make the substitute system apply to injuries without as well as those within the state. Is it likely that the legislature intended a substitute system applicable to employees when employed within the state, and inapplicable when employed elsewhere? How could the employer engaged in intrastate and interstate em-



ployment take advantage of the substitute system? If the agreement of this character had to be confined to the injuries received in the state, neither employer nor employee would enter into it. Practically the provision for a substitute system would be in part nugatory.

Certain sections of the act are referred to as indicating that the act has relation exclusively to intrastate injuries. Thus, § 7, which requires the employer to furnish medical and surgical aid, and § 23, which requires the injured employee to submit himself to examination by a reputable physician, are said necessarily to refer to Connecticut practitioners. We see no practical reason why these sections may not refer to the practitioner without the state as well as within it. Unless this limitation be read in the section, the language used does not express the limitation.

Under § 17 each commissioner has jurisdiction of all claims and questions arising in his district; hence it is urged no commissioner has jurisdiction of the cases at bar. We think the claims and questions relating to these cases may reasonably be said to arise in the place of domicile of the injured, if in the state, which in these cases is the place of the contracts, and the place from which the respondent hails.

Section 22 provides that the voluntary agreement, and § 26, that the awards of the commissioners, shall be filed in the office of the clerk of the superior court for the county "in which the injury occurred." These provisions lend force to the respondent's claim. But provisions of this character should not be held to be mandatory, and thus permitted to defeat a primary purpose of the act. If the voluntary agreement and the award be filed in the place of the agreement or contract, this will be as close a compliance with these provisions as the act admits of in cases of injuries occurring without the state.

The provision in § 27, that an appeal from the finding and award may be had "to the superior court for the county in which the injury was sustained," gives a stronger color to the respondent's claim than any other section of the act.

In legislative acts inaugurating a new system not infrequently are found contradictory provisions, and it becomes the duty of the court to reconcile them so far as it can. It does this whenever it is possible in such way as to sustain the act and carry out its purposes. This we believe to be our present duty. In a sense the injury may be said to have been sustained in the place of the contract, and if appeal is taken, in cases of injury occurring without the state, L.R.A.1916A.

to the county of the contract, the terms of the act will be reasonably satisfied. The precise question we are considering has been the subject of discussion in two cases. One under the New Jersey act, a contractual optional act very similar to our own, where the trial court, in *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121, construed the contract under the New Jersey act as we construe these contracts. The other under the Massachusetts act, where the supreme judicial court construed their act as confined to accidents within the state. *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60. We must accept the construction accorded the Massachusetts act by its supreme judicial court. It may be well, however, to point out that the court does not state that its act is contractual in character. That, as we have indicated, is of final importance in the conclusion we reach concerning our own act. Then, too, under the Massachusetts act, the employee is merely the beneficiary under a contract between the employer and the insurer; with us the employer and employee enter into a contract relation. In its reference to and comment upon certain sections of their act the court says that it must be found within the act from "unequivocal language," or "plain and unmistakable words," that the act was intended to relate to injuries without the commonwealth. We have adopted a broader rule. We read our act in the light of the purpose, subject-matter, and history of the act to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction. This is our ordinary rule in the interpretation of statutes. The Massachusetts court states that "the subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs."

And it argues that, if the act had intended employers and employees from different states to carry their domiciliary personal-injury law with them into other jurisdictions, it would have expressed its intent in unambiguous words. This argument concerns a proceeding to enforce an *ex delicto* claim, not one for compensation by way of contract. It is also argued that, if an act is given extraterritorial force, similar effect must be given to like laws of other states. If contracts of employment cover compensation for injuries outside the state, recovery for these will be governed by the usual rules for the construction and enforcement of all contracts. We should give similar effect to contracts of like character to those before us, though made under a compensa-

tion act of another jurisdiction, provided they did not conflict with our law or public policy, and the machinery provided for the ascertainment and collection of the compensation could be used in our jurisdiction.

Where, as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign jurisdiction. 1 Bradbury, Workmen's Compensation Law, 2d ed. p. 52. If it should be necessary to so rule, no hardship would result. The parties in interest would be relegated to the place where they had elected to make their contract, and no questions of conflict of laws could arise. At the base of this

question is the character of the compensation. Mr. Bradbury, repudiating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the state. We think his later conclusion sound and one which will prove beneficial alike to employer and employee.

The questions of dependency are settled by the findings of the commissioner. Nothing appears to indicate that he committed an error of law in making these findings or in drawing his conclusions from them.

The Superior Court is advised to render its judgment dismissing these appeals.

The other Judges concur.

### Annotation—Extraterritorial jurisdiction of workmen's compensation act; conflict of laws.

As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

It is not proposed to enter into the field of conflict of laws further than to state concisely the precise holding of the cases construing the workmen's compensation statutes. Any attempt to deduce general rules from these cases would be misleading, since they are governed by general principles which are not in any way peculiar to these statutes. The question of the extraterritorial effect of these statutes is so interwoven with the question of conflict of laws that the two subjects will be discussed together.

It is to be noted that *REYNOLDS v. DAY and PENDER v. H. & B. AMERICAN MACH. CO.* present distinct questions: The first, whether, in a state adopting the principles of industrial insurance, an action for damages may be maintained in accordance with the law of the state in which the injury was received; the second, whether an action of damages may be maintained in accordance with a law of the forum, where an industrial insurance act is in force in the state in which both the contract of employment was made and the injury was received.

Although the contract of employment was made in New York, the New Jersey compensation act applies where the injury occurred in New Jersey, and the contract of employment contemplated the performance of the employee's duties partly in New York and partly in New Jersey, and there was nothing in the contract to show that the employer sought to be exempted from the New L.R.A.1916A.

Jersey act, and he had given no notice under § 2 of the statute that he elected not to be bound by it. *American Radiator Co. v. Rogge* (1914) 86 N. J. L. 436, 92 Atl. 85, affirmed in — N. J. —, 93 Atl. 1083, and followed in *Davidheiser v. Hay Foundry & Iron Works* (1915) — N. J. —, 94 Atl. 309, and in *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915) — N. J. L. —, 95 Atl. 753.

But the New York court has held that the provisions of the New Jersey statute apply only where the contract of hiring was made in that state. *Pensabene v. S. & J. Auditor Co.* (1913) 155 App. Div. 368, 140 N. Y. Supp. 266. The court held that a complaint in an action under the New Jersey statute, which fails to set up a hiring made in that state, will be dismissed on demurrer.

The supreme court of New York state does not have jurisdiction of a proceeding under ¶ 18 of the New Jersey act, which provides that in case of a dispute or failure to agree upon a claim for compensation between the employer and employee, either party may submit the claim to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, merely because the complaint alleges that personal service cannot be obtained upon the defendant, which is a corporation and has removed its place of business to the state of New York, in which state it was incorporated. *Lehmann v. Ramo Films* (1915) — Misc. —, 155 N. Y. Supp. 1032.

A workman cannot claim to be ignorant of the compensation act of Wisconsin.



sin, although the contract of employment was made in Minnesota, in which state he worked for some time, but later went to work in Wisconsin at the request of the employer. *Johnson v. Nelson* (1914) 128 Minn. 158, 150 N. W. 620.

There is a sharp conflict of authority as to whether or not the compensation act has extraterritorial effect. It has been held that the Massachusetts act does not cover accidents occurring outside the limits of the state.

Thus, in *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60, in holding that the Massachusetts act had no application to accidents occurring outside the state, the court said that, in the absence of unequivocal language to the contrary, it was not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the state. The court further pointed out that there were several provisions of the statute which indicate solely intrastate operation. It was provided that the employee who had received an injury should submit himself, on request, to be examined by a physician or surgeon authorized to practise medicine under the laws of the commonwealth; the part of the act dealing with procedure dealt only with Boards and courts within the commonwealth; the hearings of the committee on arbitration were to be held in the city or town where an injury occurred; upon resort to the court, copies of the papers were to be presented "to the superior court for the county in which the injury occurred, or for the county of Suffolk," in which county the officers of the Industrial Accident Board were; employers were to make report of accidents within forty-eight hours. The Massachusetts employees' insurance association created by the act, with power to make and enforce reasonable rules and regulations for the prevention of injury on the premises of the subscribers, "and to this end its inspectors shall have free access to such premises during working hours," could have such power only within the state. The act disclosed no purpose to exempt from its operation nonresident employees of alien employers while working within the state, and if the Massachusetts act is to be interpreted as having extraterritorial L.R.A.1916A.

force, similar effect must be accorded to like laws of other states. Agreements made by employees to waive the provisions of the act are made invalid; and it was provided that no payment under the act shall be liable in any way for debts of the employee. The court also called attention to the fact that the act was copied largely from the English workmen's compensation act and that that act, although it has been generally held to be inoperative outside of the United Kingdom, in express terms, applies to masters, seamen, and apprentices in the sea service under certain conditions, and definitely points out the manner of proving and enforcing claims for injury occurring therein with reference plainly to those outside the United Kingdom, and had the legislature intended to make the act apply extraterritorially, it should have so expressly provided.

The court further said that a number of foreign acts made careful and definite provisions for accidents occurring outside of their territory, and in a footnote the following list was given: 24 Annual Report of U. S. Com. of Labor, vol. 2 (1909) France: Acts of 1898, 1902, 1905, and 1906, p. 2501; Austria: Law of 1894, art. 2, pp. 2456, 2457; Belgium: Act of 1903, art. 26, p. 2464; Germany: Law of 1900 (a), art. 4, p. 2517 (see also German Ins. Code of 1911, art. 157, translated in Boyd, *Workmen's Compensation*, p. 1252); Hungary: Act No. 19 of 1907, arts. 4, 5, & 6, p. 2569; Italy: Law of 1904, arts. 21 & 25, p. 2617; Luxemburg: Law of 1902, art. 3, pp. 2621, 2622; Netherlands: Law of 1901, art. 9, p. 2641.

So, too, the Michigan act does not apply to injuries occurring outside the borders of the state. *Keyes-Davis Co. v. Alderdyce*, *Detroit Legal News*, May 3d, 1913 (Mich.) 3 N. C. C. A. 639, note. The court based its decision upon two grounds: First, a general rule of statutory construction that every statute is confined in its operation to persons, property, and rights which are within the jurisdiction of the legislature which enacted it; second, the provision of pt. 3, § 8, of the act, which requires that the hearing to adjudicate disputed claims for compensation "shall be held at the locality where the injury occurred."

Section 7 of the English act makes provision for awarding compensation for

injuries to workmen in the sea service; except as it is expressly given in § 7, the act has no application outside the territorial limits of the United Kingdom. *Tomalin v. S. Pearson & Son* [1909] 2 K. B. (Eng.) 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1 (English contractor not liable for compensation for death of workman engaged in working for him in the island of Malta); *Schwartz v. India Rubber, Gutta Percha & Teleg. Works Co.* [1912] 2 K. B. (Eng.) 299, [1912] W. N. 98, 28 Times L. R. 331, 81 L. J. K. B. N. S. 780, [1912] W. C. Rep. 190, 106 L. T. N. S. 706, 5 B. W. C. C. 390 (no compensation for death of workman lost in the Bay of Biscay while on his way to work at Teneriffe); *Hicks v. Maxton* (1907, C. C.) 124 L. T. Jo. (Eng.) 135, 1 B. W. C. C. 150 (no compensation for injuries to charwoman taken from England by a French woman to do work for her in France and injured while in that country).

A different rule, however, prevails in other states.

That the Connecticut statute has an extraterritorial effect is the decision in *KENNERSON v. THAMES TOWBOAT CO.*

So, it was held in *Rounsaville v. Central R. Co.* (1915) — **N. J. L.** —, 94 Atl. 392, that the fact that the accident happened in another state is irrelevant when the proceedings were brought in New Jersey for liability under the New Jersey act, and the contract of employment was a New Jersey contract.

And the New York act has been held to apply to accidents which have occurred outside of the state.

One argument in support of the contention that the New York statute applies extraterritorially is that the amount which an employer is required to pay into the insurance fund is based solely upon the size of his pay roll and the character of his business, and the fact that one of his employees may from time to time be outside the state in the course of his employment does not diminish the amount of premium which the employer has to pay. *Spratt v. Sweeney & G. Co.* (1915) 168 App. Div. 403, 153 **N. Y. Supp.** 505. The court said: "The employee cannot refuse to do the master's bidding within the course of the employment upon the ground that it requires him to pass over the state line, and the law cannot contemplate that he shall lose the benefit of the act because L.R.A.1916A.

he is performing the duties of his employment. The statute must have a broad and liberal interpretation to protect the employee for all injuries received in the course of the employment, and to charge upon the fund or the insurer the loss which otherwise must fall upon the master. By complying with the act the employer is guaranteed protection, and the moneys which he has paid into the fund or secured to be paid must bear the losses which they were intended to meet; otherwise the employer and the employee are suffering at the hands of the state."

The New York statute expressly applies to the operation without the state, "including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce." In *Edwardsen v. Jarvis Lighterage Co.* (1915) 168 App. Div. 368, 153 **N. Y. Supp.** 391, it was held that the captain of a lighter who was injured while his lighter was being unloaded was engaged in the "operation" of the lighter, and consequently was entitled to compensation although the injury took place outside of the state.

A lower New York court has held that the workmen's compensation act of Germany, to which both the employer and employee subscribe, is a bar to an action in New York state for injuries to the employee received while on the vessel of defendant as it was leaving quarantine to dock at New York City. *Schweitzer v. Hamburg-American Line* (1912) 78 Misc. 448, 138 **N. Y. Supp.** 944. The court said: "A foreign law to which both employer and employee engaged in interstate and foreign commerce and transportation have subscribed, and upon the basis of which the contract of employment was made and entered into, where the cars or ships of the employer enter our state, and in or upon which, while within our borders, an accident occurs to the employee through his employer's negligence, particularly where the contract of employment provides for a fixed compensation in case of specified injury to take the place of a right of action at law, and which is lawful both in the place where made and that in which the cause of action arose, should obtain recognition and enforcement here. To hold otherwise works not for benefit, but rather injury to our interstate and foreign commerce."

W. M. G.



WASHINGTON SUPREME COURT.  
(Department No. 2.)

STATE OF WASHINGTON EX REL.  
FRANK JARVIS  
v.

FLOYD L. DAGGETT et al., Commission-  
ers of the Industrial Insurance Commis-  
sion of the State of Washington.

(— Wash. —, 151 Pac. 648.)

**Master and servant — injury on vessel  
— applicability of state workmen's  
compensation act.**

A state cannot extend the provisions of a workmen's compensation act to injuries occurring on vessels on local waters within the admiralty jurisdiction of the United States, with respect to which Congress has established a measure of liability limited to the value of the owner's interest in the vessel and freight pending at the time of the injury.

*For other cases, see Master and Servant, II.  
a, 1, in Dig. 1-52 N. S.*

(September 13, 1915.)

**A**PPPLICATION for a writ of mandamus to compel respondents to make a demand upon certain navigation companies for premiums, in accordance with the schedule set out in the workmen's compensation act. Writ denied.

The facts are stated in the opinion.

Mr. Charles H. Miller, for petitioner:

The act of the legislature of the state of Washington is not a regulation of commerce, but of police; and, being so, it was passed in the exercise of a power which rightfully belonged to the state. The state of Washington possessed the power to pass this law before the adoption of the Constitution of the United States. The end and means here used are within the competency of the states.

State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; State v. Mountain Timber Co. 75 Wash. 581, L.R.A.—, —, 135 Pac. 645, 4 N. C. C. A. 811; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Wilmington Transp. Co. v. Railroad Com-

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to the limitation of the application of state compensation statutes by Federal laws, see annotation, post, 461.  
L.R.A.1916A.

mission, 236 U. S. 151, 59 L. ed. 508, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276.

A marine tort or a tort committed upon a vessel engaged in business wholly within the state is actionable at common law.

The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Woolsey, International Law, 6th ed. p. 72; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; The Hine v. Trevor, 4 Wall. 555, 18 L. ed. 451; Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

Messrs. W. V. Tanner, Attorney General, and John M. Wilson, Assistant Attorney General, for respondents:

If a voyage is made upon navigable waters of the United States, the fact that the vessel is engaged solely in intrastate commerce, carrying on trade between ports of the same state, does not take the case out of the jurisdiction of admiralty.

1 Cyc. 817; The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483; Workman v. New York, 179 U. S. 558, 45 L. ed. 319, 21 Sup. Ct. Rep. 212; The Thielbek, 211 Fed. 685.

The particular injury described in the petition constitutes a maritime tort, and is within the jurisdiction of the admiralty court.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733.

The state legislature is without power to prescribe an exclusive remedy, or to impose upon the employer an additional burden in the payment of premiums, as a consideration for relieving the employer from actions for injuries which may be brought by the workman, unless it can protect the employer from all remedies which the injured workman may have against him.

The Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891.

Mr. J. S. Robinson, amicus curiæ:

The fact that seamen have remedies in admiralty prevents the application of the workmen's compensation act to the operation of Puget Sound steamboats engaged exclusively in intrastate trade.

Report of the Atty. Gen. 1911-1912, p. 155; Stoll v. Pacific Coast S. S. Co. 205 Fed. 169; The Fred E. Sander, 208 Fed. 725, 4 N. C. C. A. 891, 212 Fed. 545, 5 N. C. C. A. 97; Murray v. Pacific Coast S. S. Co. 207 Fed. 688; Meese v. Northern P. R. Co. 206 Fed. 222, 127 C. C. A. 622, 211 Fed. 254, 4 N. C. C. A. 819; Barrett v. Grays Harbor Commercial Co. 209 Fed. 95, 4 N. C. C. A. 756.

Seamen are a class apart from all other classes of workmen named in the act

Robertson v. Baldwin, 165 U. S. 275, 285, 41 L. ed. 715, 719, 17 Sup. Ct. Rep. 326; The Osceola, 189 U. S. 159, 47 L. ed. 760, 23 Sup. Ct. Rep. 483.

Vessel operators are a class apart from other employers named in the act, because their vessels are wholly under the control of Congress.

White's Bank v. Smith (White's Bank v. The Robert Emmett) 7 Wall. 646, 653, 19 L. ed. 211, 213; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 328, 58 L. ed. 624, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; The Hine v. Trevor, 4 Wall. 555, 570, 18 L. ed. 451, 456; The Glide, 167 U. S. 608, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

The power of the Federal government to enact legislation for the benefit of seamen is exclusive.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 555, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Schuede v. Zenith S. S. Co. 216 Fed. 586; Easton v. Iowa, 188 U. S. 237, 47 L. ed. 459, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; Erie R. Co. v. New York, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 305; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 371, 56 L. ed. 237, 32 Sup. Ct. Rep. 160.

Admitting the right of the state to pass the compensation act under its police power, the act, so far as it relates to seamen and their employers, comes into conflict with and is repugnant to existing Federal laws.

Sinnot v. Davenport, 22 How. 243, 16 L. ed. 243; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 419, 58 L. ed. 1382, L.R.A. 1915E, 942, 34 Sup. Ct. Rep. 790; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; Craig v. Continental Ins. Co. 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97; La Bourgogne (Deslions v. La Compagnie Générale Transatlantique) 210 U. S. 95, 52 L. ed. 973, 28 Sup. Ct. Rep. 664; Oceanic Steam Nav. Co. v. Watkins, 223 U. S. 723, 56 L. ed. 631, 32 Sup. Ct. Rep. 524; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; Seese v. Monongahela River Consol. Coal & Coke Co. 155 Fed. 507; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 99, 104, 39 L. ed. 910, 913, 15 Sup. Ct. Rep. 802. L.R.A.1916A.

Main, J., delivered the opinion of the court:

This is an original application in this court for a writ of mandate to compel the members of the state Industrial Insurance Commission to make a demand upon the Puget Sound Navigation Company and the Inland Navigation Company for the percentage of the pay rolls of these companies, in accordance with the schedule set out in the workmen's compensation act passed at the legislative session for the year 1911 (Laws 1911, chap. 74).

The facts as stated in the petition, and the affidavit in support thereof, are in substance as follows: On the 31st day of May, 1914, and for some time prior thereto, the Puget Sound Navigation Company and the Inland Navigation Company were foreign corporations, with their principal place of business in this state at Seattle. These corporations were engaged in operating steamboats upon the waters of Puget Sound within the state of Washington. They were the owners of the steamship Whatcom, engaged in carrying passengers and freight on Puget Sound for hire. On or about the date mentioned one Frank Jarvis was in the employ of the companies mentioned, working upon the steamship Whatcom as an oiler. While engaged in this occupation, Jarvis sustained an injury which he claims was due to the negligence of the companies mentioned. After sustaining this injury, he presented a claim to the Industrial Insurance Commission. This claim was rejected by the Commission, for the reason that it had no jurisdiction over the navigation companies mentioned. The navigation companies had never paid any premiums to the Industrial Insurance Commission, and no demand had been made upon the companies for premiums under the compensation act.

Thereafter Jarvis instituted an action at common law in the superior court for King county, claiming damages by reason of the injury. This action was afterwards removed to the Federal court upon the ground of diverse citizenship. The United States district court for the state of Washington, western division, sitting at Seattle, granted a motion for judgment in favor of the defendants, the corporations above mentioned. The reason for entering this judgment was because no demand had been made upon the navigation companies by the Industrial Insurance Commission for the state of Washington for the percentage of their pay rolls, as specified in the industrial act. As already stated, the present proceeding was instituted to compel the Industrial Insurance Commission to make a demand for such premiums. The case presents the question



whether a seaman employed upon a boat operating upon Puget Sound, and engaged in intrastate commerce, is covered by the provisions of the industrial insurance or workmen's compensation act. If such employees are covered by the act, the writ in this case will be granted; if they are not, it will be denied.

The first section of the act, which is in a sense a preamble, after stating that the common-law system covering the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, that in practice it proves to be economically unwise and unfair, that its administration has produced the result that little of the cost to the employer has reached the workman, that the remedy of the workmen has been uncertain, slow, and inadequate, that injuries in such work have become frequent and inevitable, that the welfare of the state depends upon its industries, and upon the welfare of its wage worker, provides that all phases of the common-law system are withdrawn from private controversy, and sure and certain "relief for workmen injured in extrahazardous work, and their families and dependents, is hereby provided, regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

It should be noted that in this section of the act it is provided that the method of compensation therein provided for shall be to the exclusion of every other remedy, and that all civil actions and civil causes of action for personal injuries, and all jurisdiction of the courts of the state over such causes, are abolished. Section 4 of the act contains a schedule in accordance with which the employer must pay the percentage of his pay roll there set out. In this schedule, under the head of "operation," will be found: "Steamboats, tugs, ferries, .030." In the same section of the act the industries are classified which are required to make the payments as specified in the schedule. In class 20 are found, "Steamboats, tugs, ferries."

Prior to the passage of this act, a seaman injured while employed upon a boat operating upon Puget Sound had the choice of two remedies: He could either seek re-

lief in admiralty in the Federal court, or pursue a common-law action in the state court. By article 3, § 2, of the Federal Constitution, the judicial power of the United States is extended to "all cases of admiralty and maritime jurisdiction." This grant of admiralty jurisdiction by the Constitution to the Federal courts was followed by the judiciary act of 1789 (U. S. Rev. Stat. § 563): ". . . Saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

In *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, construing this statute, it was said that it "leaves open the common-law jurisdiction of the state courts over torts committed at sea." The Constitution of the United States, in extending the judicial power to all cases of admiralty and maritime jurisdiction, thereby adopted the general system of maritime law which was familiar to lawyers and statesmen of the country when the Constitution was adopted. In *The Lottawanna* (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654, it was said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. It follows, therefore, that the legislature, in passing the compensation act, could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. Gathering the purposes of the act from all its provisions, we think it could not have been the legislative intent to attempt to encroach upon the admiralty jurisdiction of the Federal court. The excerpt from the first section of the act, above quoted, substitutes the provisions of the act for every other remedy, proceeding, or compensation, except as therein provided, which proviso is not here material, as it does not bear upon the question. This declaration is fol-

lowed by the clause which abolishes all civil actions and civil causes of action for personal injuries, and all jurisdiction of the state courts over such causes. It seems to be the purpose of the act to give the relief therein granted where the legislature had the power to abolish every other remedy. If companies operating boats upon Puget Sound are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the 14th Amendment to the Constitution of the United States which provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws."

The petitioner seeks to apply that rule of law which permits the state to legislate upon matters which are distinctly local in character, although embraced within the Federal authority, until such time as the Federal authority may be exercised by act of Congress. *Wilmington Transp. Co. v. Railroad Commission*, 236 U. S. 151, 59 L. ed. 508, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276, Feb. 1, 1915. Relying upon this rule, it is argued that, since Congress has passed no workmen's compensation act which covers employees on board ships, the industrial insurance law applies until such time as a Federal act is passed. This position cannot be sustained; but, in considering it, it will be assumed that, if the workmen's compensation act by its terms was intended to include the owners of and the employees upon vessels, the law covering such scope does not offend against the provision of the 14th Amendment to the Constitution above referred to.

By § 4283, Rev. Stat. U. S. (Comp. Stat. 1913, § 8021), the liability of the owner of any vessel for damages or injury which occur without the privity or knowledge of such owner is limited to "the amount or value of the interest of such owner in such vessel and her freight then pending." By L.R.A.1916A.

§ 4289 (Comp. Stat. 1913, § 8027), the limited liability provided for in § 4283 is made to apply to owners of "all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." The limited liability thus provided for by Congress applies to cases of personal injuries, as well as to cases of loss of or injury to property. In *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612, speaking upon this question, it was said: "We think that the law of limited liability applies to cases of personal injury and death, as well as to cases of loss of or injury to property."

In *Craig v. Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97, construing "privity or knowledge," as used in § 4283, it was held that, in order to make the owner of a vessel liable for negligence, "it must appear that the owner had directly participated in the negligence." There is no claim here that the owners of the vessel *Whatcom* directly participated in the alleged negligence which caused the injury to the petitioner. It will thus be seen that § 4283 of the Federal statutes limits the liability of the owner of a vessel. This limited liability becomes the extent of recovery. Beyond the liability as limited by the statute, there can be no recovery. The workmen's compensation act limits the amount for which an employer may become liable as specified in the act. The Congress of the United States, having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legislature would not have the power to fix another and different standard or measure. In *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243, it was said: "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment."

The writ will be denied.

**Morris, Ch. J., and Fullerton, Parker, and Ellis, JJ., concur.**



## ILLINOIS SUPREME COURT.

LAURA STALEY, Admr., etc., of Sylvester C. Staley, Deceased, Plff. in Certiorari,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(268 Ill. 356, 109 N. E. 342.)

**Master and servant — accidental injury to interstate employee — power of state to provide compensation.**

The Federal employers' liability act covers the entire field of compensation for injury to employees engaged in interstate transportation by rail, and a state compensation act is therefore not applicable in case of injury to such employee without negligence on the part of the employer, although no provision may be made for such cases by the Federal act.

*For other cases, see Commerce, II. c, in Dig. 1-52 N. S.*

(June 24, 1915.)

**C**ERTIORARI to the Appellate Court, Fourth District, to review a judgment modifying a judgment of the Circuit Court for Marion County, in plaintiff's favor in a proceeding under the workmen's compensation act, to recover compensation for the death of her husband. Reversed.

The facts are stated in the opinion.

Messrs. **Frank F. Noleman**, and **June C. Smith**, for plaintiff in certiorari:

The compensation act is a police regulation, and as such is one of the powers reserved to the state.

*Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Booth v. People*, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084; *Culver v. Streator*, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810; *Cole v. Hall*, 103 Ill. 30; *Reeves v. Corning*, 51 Fed. 774; *State v. Fitzpatrick*, 16 R. I. 54, 1 Inters. Com. Rep. 713, 11 Atl. 767; *State v. Schlenker*, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; *Cantini v. Tillman*, 54 Fed. 969; *People v. Rosenberg*, 138 N. Y. 415, 34 N. E. 285.

The act is not one regulating commerce,

**Note.** — As to the application and effect of workmen's compensation acts generally, see annotation, ante, 23.

As to the limitation of the application of the state compensation statutes by Federal laws, see annotation, post, 461. L.R.A.1916A.

within the meaning of the commerce clause of the Federal Constitution.

*Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Culver v. Streator*, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Gibbons v. Ogden*, 9 Wheat. 9, 6 L. ed. 25; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Missouri K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. ed. 1377, L.R.A. 1915E, 942, 34 Sup. Ct. Rep. 790; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Until such time as Congress enacts legislation upon a subject within its power, each state is free to legislate upon that subject.

*Southern P. Co. v. Campbell*, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027; *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; *Allen v. St. Louis, I. M. & S. R. Co.* 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030; *Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.)* 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. ed. 1377, L.R.A. 1915E, 942, 34 Sup. Ct. Rep. 790; *Port Richmond & B. P. Ferry Co. v. Hudson County*, 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506.

The procedure followed in this case was

suitable and proper, and the only procedure contemplated by the compensation act.

Moore v. Tierney, 100 Ill. 207; Brueggemann v. Young, 208 Ill. 181, 70 N. E. 293; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Turnes v. Brenckle, 249 Ill. 394, 94 N. E. 495; People ex rel. Smith v. Rodenberg, 254 Ill. 386, 98 N. E. 764; Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65; Ward v. Farwell, 97 Ill. 593; Holnback v. Wilson, 159 Ill. 148, 42 N. E. 169; People use of Peoria County v. Hill, 163 Ill. 186, 36 L.R.A. 634, 46 N. E. 796; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 44 L.R.A.(N.S.) 358, 134 Am. St. Rep. 316, 89 N. E. 1022.

Messrs. Blewett Lee and H. S. Horton, with Messrs. W. W. Barr, C. E. Feirich, and Kagy & Vandervort, for defendant in certiorari.

Carter, J., delivered the opinion of the court:

This a proceeding under the workmen's compensation law of this state (Laws of 1911, p. 315), commenced by petition filed by plaintiff in error in the circuit court of Marion county for compensation for the death of her husband, who was run over and killed by one of defendant in error's switch engines in its yards near Centralia, Illinois. The defendant in error was served with notice, and, after certain motions had been made, filed an amended answer, wherein it set up that the cause stated in the petition was not comprehended within the meaning of said workmen's compensation act, but was within the scope and meaning of the Federal employers' liability act. The trial court found in favor of plaintiff in error, and entered judgment in her favor for \$3,500, payable in a lump sum. From this judgment defendant in error appealed to the appellate court. That court affirmed the judgment of the trial court, except that it was held that under the workmen's compensation act it should not be for the full amount of \$3,500, but should have been commuted at its present value. Plaintiff in error thereupon brought the cause to this court by petition for certiorari.

Several questions are raised and argued in the briefs. It is first necessary to consider and decide the question whether there can be a recovery in this cause under the Illinois workmen's compensation act, so called, or whether the cause is comprehended within the meaning and scope of the Federal employers' liability act and recovery can only be had under this last-named law. If the position of defendant in error on this point, raised by filing cross errors in this L.R.A.1916A.

court, is sustained, it will be unnecessary to consider the other questions involved.

Counsel for defendant in error insist in their amended answer that plaintiff in error's intestate was engaged, at the time of his fatal injury, in interstate commerce, and that therefore the Federal employers' liability act controls, superseding all state laws on the subject. The evidence showed that the deceased was working, on the day of the injury, March 28, 1913, in defendant in error's switch or terminal yards near Centralia, Illinois, as a machinist; his duty being to repair the switch engines in the yards. He was sent by his superior officer to repair the whistle rod on an engine engaged in switching and handling interstate commerce. As he went down a switch track, he saw the engine coming toward him, and stepped out of its way onto another track immediately in front of another moving engine, by which he was knocked down and killed instantly. The last-named engine was also engaged in switching all classes of freight, interstate as well as intrastate. Counsel for defendant in error contend, and counsel for plaintiff in error concede, that the deceased was, at the time of the accident, engaged in interstate commerce. On the evidence as presented in the record before us no other conclusion can be reached under the holdings of the United States Supreme Court. Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26. The Federal employers' liability act will therefore control if it covers the identical subject-matter or the same field as that covered by the Illinois workmen's compensation act.

Counsel argue at length as to whether the workmen's compensation act imposes a direct burden upon interstate commerce. In our judgment that is not the decisive question here. The general principles governing the exercise of Federal authority when interstate commerce is affected have been firmly established by the decisions of the United States Supreme Court. The power of Congress to regulate commerce among the several states is supreme and plenary under the Constitution. The reservation to the states to legislate on questions affecting interstate commerce is only of that authority which is consistent with and not opposed to the grant of Congress, which extends to every instrumentality or agency by which interstate commerce may be carried on. The decisions hold that with respect to certain subjects.



embraced within the grant of the Constitution which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority, the power of Congress is exclusive, while in other matters admitting of diversity of treatment, according to the special requirements of local conditions, "the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." *Minnesota Rate Cases* (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729. The doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce, forms the basis of the foregoing classification. Within certain limitations there remains to the states, until Congress acts, a wide range for the exercise of the power appropriate to territorial jurisdiction although interstate commerce may be affected. Included within these limitations are those matters of a local nature as to which it is impossible to derive from the constitutional provisions an intention that they should go uncontrolled pending Federal legislation. It is therefore "competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved." 230 U. S. on page 402. It is unnecessary for us to refer to or discuss the various decisions touching this question. Many of them are referred to and considered and these general doctrines discussed at length in the case from which we have just quoted. The question in the case before us is not whether the deceased was engaged in interstate commerce at the time of the accident, for that is conceded. Neither is it necessarily the question whether the workmen's compensation act affected directly and substantially an instrument of commerce. The argument of counsel for plaintiff in error that the workmen's compensation act affects the employee "solely as a member of society, and not as an instrument of society," and is therefore within the police power of the state, cannot be sustained if Congress has by legislation acted on the "subject-matter" or the "particular subject" or in the "same field" (as those terms are understood in the decisions) as that covered by the Illinois workmen's compensation act. Counsel in their briefs state that the particular question here presented has never been considered or decided by any court, either state or Federal. We have L.R.A.1916A.

been unable to find any decision of a court of final review where such question has been under consideration. But see, as bearing on this question in *nisi prius* and intermediate courts of review, the following: *Rounsaville v. Central R. Co.* 37 N. J. L. J. 295; *Smith v. Industrial Acci. Commission*, 26 Cal. App. 560, 147 Pac. 600; *Winfield v. New York C. & H. R. R. Co.* 168 App. Div. 351, 153 N. Y. Supp. 499. We have therefore deemed it proper to discuss at some length the authorities that bear, directly or indirectly, on the point to be decided.

In considering the question whether Congress has acted upon the same matter as that covered by a state statute, the Federal courts have used different terms in different decisions. In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, the words "subject-matter" or "subject contained" in the state statute were employed.

In *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, 29, the court said (p. 101): "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains . . . in that commerce; and that such legislation will supersede any state action on the subject."

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, in considering this question the court used the term "particular subjects."

In *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 911, 15 Sup. Ct. Rep. 802, 803, the opinion states (p. 102): "Clearly the state and the national acts relate to the same subject-matter and prescribe different rules. . . . In such case one must yield, and that one is the state law."

In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289, 291, the court, in discussing the validity of state regulations as to the liabilities of state carriers of passengers, said (p. 137): "They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the contract and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

This definition or rule as laid down in this last case was quoted with approval in

*Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488, 493, in considering the Federal statutes bearing on the interstate shipment of cattle, and comparing those statutes with statutes of Kansas with reference to bringing into that state cattle liable to communicate certain diseases, the court said (p. 627): "Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer."

And it was there held that the Federal and state statutes were not in conflict.

Somewhat similar statutes were under consideration in *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 95, 12 Am. Crim. Rep. 506. The opinion states (p. 146): "When the entire subject of the transportation of live stock from one state to another is taken under direct national supervision, and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters, and covering the same ground, will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. [Citing authorities.] The power which the states might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the states. But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious, and communicable diseases."

In *Northern P. R. Co. v. Washington*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160, the court quoted with approval the statement in the opinion of a state court L.R.A.1916A.

that if Congress has legislated, "its act supersedes any and all state legislation on that particular subject;" and further stated that the power of the state court to act only existed from the silence of Congress on the subject, and continued (p. 378): "This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation, that subject was at once removed from the sphere of the operation of the authority of the state."

In this case it was held that congressional legislation as to hours of service so completely covered the field as to prevent state legislation on that subject.

In *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140, 143, the court, in discussing the power of the states to make rates, said with reference to a state statute (p. 437): "Does it, as contended by the plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the state cannot even supplement? In other words, has Congress taken possession of the field?"

In *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715, 726, Federal and state statutes with reference to the sale and shipment of food for domestic animals were considered. It is stated in the opinion (p. 533): "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regulation of Congress within the sphere of its delegated power. [Citing authorities.] But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

In *Hampton v. St. Louis, I. M. & S. R. Co.* 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263, it was held that an Arkansas statute imposing a penalty for failure to deliver cars had been superseded by the provisions of the Federal act, although the provisions of the two acts were not identical.

In *Erie R. Co. v. New York*, 233 U. S. 671,



58 L. ed. 1149, 1154, 52 L.R.A. (N.S.) 266, 34 Sup. Ct. Rep. 756, 760, Ann. Cas. 1915D, 138, the court, in discussing the power of the state and nation to regulate the hours of employment of railroad employees, said that where there is a conflict the state legislation must give way; that when Congress acts in such a way as to manifest its purpose to exercise its authority, the regulating power of the state ceases to exist; and it was there held that the two acts were in conflict, and that one did not merely supplement the other; the opinion saying (p. 683): "It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

In *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829, 832, the court sustained a state statute requiring locomotives engaged in interstate commerce to be equipped with electric headlights of a certain candle power, as a police regulation. After discussing the authorities, including many that we have already cited in this opinion, and also considering the various acts of Congress bearing on the subject, the opinion says (p. 293): "It is manifest that none of these acts provides regulations for locomotive headlights. . . . The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken."

In *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 59 L. ed. 661, 665, 35 Sup. Ct. Rep. 304, 305, the court had under consideration an Indiana statute requiring railway companies to place secure grabirons and handholds on the ends and sides of cars engaged in interstate commerce, and it was held that until Congress had entered that field, the state could legislate as to the equipment of cars in such a manner as would only incidentally affect, without burdening, interstate commerce; but also held that Congress had entered upon that field, and therefore superseded existing state legislation on the same subject, saying (p. 446): "Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and ipso facto, supersedes existing state legislation on the same subject. Congress, of course, could have 'circumscribed its regulations' so as to occupy a limited field. *Savage v. Jones* and *Atlantic Coast Line R. Co. v. Georgia*, supra. But, so far as it did legislate, the exclusive effect of the L.R.A. 7916A.

safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment, nor could they punish by imposing greater or less or different penalties, for, as said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 L. ed. 1060, 1089: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. . . . The will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed." Without, therefore, discussing the many cases sustaining the right of the states to legislate on subjects which, while not burdening, may yet incidentally affect, interstate commerce, it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject."

What is the "subject," "particular subject," "subject-matter," "field," "particular field," or "chosen field" covered by the Federal employers' liability act? That act was originally passed in 1908, having since been amended in some particulars on points not at issue in this case. The title and the principal sections that must be considered read as follows:

**An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . .

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. [35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657.]

A former act of Congress had been declared unconstitutional in *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. L.R.A.1916A.

Rep. 141, because that act attempted to regulate the relation of master and servant in intrastate as well as interstate commerce. The precise question here before us was not touched upon in that case. It is reasonable to presume that Congress, in passing the later act which we now have under consideration, intended to cover the relation of master and servant only as to acts directly affecting interstate commerce. The first and perhaps the leading case discussing and construing the present act is *Second Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 176, 1 N. C. C. A. 875. In that case the court said (p. 51): "The present act, unlike the one condemned in *Employers' Liability Cases*, supra, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce."

Again, on page 54: "Prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. [Citing authorities.] The inaction of Congress, however, in no wise affected its power over the subject. [Citing authorities.] And, now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In *Fulgham v. Midland Valley R. Co.* (C. C.) 167 Fed. 660, the court said: "It is clear that the act of April 22, 1908, superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce, resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive. All state legislation on that subject must give way before that act."

To the same effect, see *Dewberry v. Southern R. Co.* (C. C.) 175 Fed. 307; *Taylor v. Southern R. Co.* (C. C.) 178 Fed. 380; *Botoms v. St. Louis & S. F. R. Co.* (C. C.) 179



Fed. 318; *Fithian v. St. Louis & S. F. R. Co.* (C. C.) 188 Fed. 842.

In *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 916, 32 Sup. Ct. Rep. 589, 592, 1 N. C. C. A. 892, in discussing the question as to whether the injured employee, in accepting benefits under a contract of membership in a railroad relief department, thereby took his case out from under the Federal employers' liability act, the court said (p. 613): "To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation."

In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, 137, Ann. Cas. 1914B, 134; it was stated (p. 576): "The court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject."

In *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, 193, Ann. Cas. 1914C, 176, the court, in discussing the scope of the Federal employers' liability act, said (p. 65): "We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. . . . We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states. Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. The subject . . . is one which falls within the police power of the state in the absence of legislation by Congress.' . . . By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. . . . It therefore follows that in respect of state L.R.A.1916A.

legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states. [Citing authorities.] The statutes of many of the states expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But, unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding state legislation."

Practically to the same effect on the question involved in this last case is *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

In *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703, 704, the court passed on the question whether the Federal employers' liability act took the place of an Arkansas statute as to recovery for the death of the plaintiff's intestate. The state supreme court had held that the act of Congress was only supplementary, and that the judgment could be upheld under the state law. The United States Supreme Court held such ruling wrong, and said (p. 704): "Coming to the merits, it now is decided that the act of Congress supersedes state laws in the matter with which it deals. [Citing authorities.] The act deals with the liability of carriers, while engaged in commerce between the states, for defects in cars."

In *Pedersen v. Delaware, L. & W. R. Co.* supra, the question was raised as to whether the act in which the plaintiff was engaged was interstate commerce, and the court said (229 U. S. 150, 57 L. ed. 1127, 33 Sup. Ct. Rep. 649, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779): "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce; . . . The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

To the same effect is *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163.

In *St. Louis, S. F. & T. R. Co. v. Seale*, supra, there was a question raised as to the applicability of a state statute. The opinion states on this point (229 U. S. 158, 57 L. ed. 1133, 33 Sup. Ct. Rep. 652, Ann. Cas. 1914C, 156): "If the Federal statute was applica-

ble, the state statute was excluded by reason of the supremacy of the former under the national Constitution. . . . The real question, therefore, is whether the Federal statute was applicable, and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged, and while he was employed by it, in interstate commerce."

In *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, 307, Ann. Cas. 1914C, 159, the court said (p. 256): "In order to bring the case within the terms of the Federal act, . . . defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the state."

It was there held that the Federal act, and not the state law, must apply as to the measure of recovery.

In *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 1068, 34 Sup. Ct. Rep. 635, 638, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, there is a very exhaustive discussion of questions that are closely analogous to the one here under consideration. That case is perhaps the most nearly in point to this one of any decided by the United States Supreme Court. The state courts, both trial and supreme, had held that certain state statutes were applicable, and in a sense supplementary, to the Federal employers' liability act. The opinion in the case held to the contrary, and among other things said (p. 501): "It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. 'Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The act is quoted in full in that case at page 6 of 223 U. S. By its first section a right of action is conferred (under conditions specified) for injury or death of the employee 'resulting, in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.' . . . But plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to

its employees for defects in insufficiencies not attributable to negligence. . . . To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence. . . . The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work. . . . It is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk by enacting statutes for the safety of employees, since this would, in effect, relegate to state control two of the essential factors that determine the responsibility of the employer."

The court discusses at length the difference between the doctrines of assumed risk and contributory negligence, and then continues: "Here, again, the court appears to have followed the local statute, rather than the act of Congress; for [the North Carolina statute already quoted] has been held by the state supreme court to abolish assumption of risk as a bar to an action by a railroad employee for an injury attributable to defective appliances furnished by the employer. . . . The trial court, while recognizing that the act of Congress applied so far as its terms extended, and that by its terms the employee is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employees contributed to the injury, at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law.

. . . It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject-matter."

L.R.A.1916A.



In *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, it was said (p. 89): "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation—not merely cumulative. . . . On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application, and the law of the state was controlling."

We have referred to and commented on practically every decision of the United States Supreme Court bearing upon this question. The decisions from other courts could not be controlling, and, at most, only persuasive. Counsel on the one hand argue that under the fair construction of the Federal employers' liability act as construed by these decisions the act covers the field of liability of common carriers by railroad for all injuries occurring in interstate commerce, whether or not there has been negligence on the part of the employer, while counsel on the other side contend that the act covers only liability of common carriers in interstate commerce when there has been such negligence. It is clear that there can be no recovery under the Federal employers' liability act, properly construed, in the absence of negligence on the part of the employer, as that term is used in the statute and in the decisions construing the same. But if the question of negligence alone determines the applicability of the Federal law, then, before it can be held that such law is applicable, there must be a final adjudication as to whether the injury resulted from negligence. Obviously, Congress legislated on more than the subject of negligence. It legislated on that, but also on the amount of recovery, and superseded all state laws on that subject, as shown by the decisions already cited. It also legislated on the subject of limitation when an action could be begun. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703, 704. It also legislated as to what persons could recover under the Federal act, and when an action would survive the death of the injured person (*Taylor v. Taylor*, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 65, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, 193, Ann. Cas. 1914C, 176); also on the subject of assumed risk and contributory negligence. We think it is clear, also, that § 5 of said employers' liability act touches upon and in a measure L.R.A.1916A.

covers cases where there is no negligence on the part of either employee or employer, for it is well known that contracts for insurance, relief benefit, or indemnity cover not only injuries caused by negligence, but all injuries caused in any way while engaged in the employment of the railroad. If the argument of counsel on this question were to be sustained, it would usually be difficult, if not impracticable, to enforce liability for injuries caused while both parties were engaged in interstate commerce on railroads. This fact lends strong support, in our judgment, to the argument that it was the intention of Congress to assume control of the entire field of liability of railroads for injuries to employees occurring in interstate commerce. The reasoning that has repeatedly controlled the action of the courts—that is, that the power of Congress to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven that the effective government of the former incidentally controls the latter (*Simpson v. Shepard*, supra, and cases cited)—would also apply on this question. The question of comparative negligence of employee and employer, assumed risk, contributory negligence, liability under indemnity or insurance contracts, under the wording of the act are so involved with that of negligence that it would seem impossible to separate the cases under the Federal employers' liability act solely on the line of the negligence of the employer. In this case there was no attempt to prove in the trial court whether the employer or its agents were in any way guilty of negligence. It seems to have been assumed in that court by all parties that that question was not the turning point in the case. From the evidence in this record no satisfactory finding could be made as to whether there was any negligence on the part of the employer. In the majority of the cases taken to the United States Supreme Court under the Federal employers' liability act, the question whether there was negligence or no negligence has not been referred to or passed on in any way in that court, and in none of them, so far as we are advised, has the question of negligence been the turning point of the case.

Counsel for plaintiff in error argue that the title of the Federal employers' liability act, especially the phrase "certain cases," shows that Congress did not intend to cover all cases of injuries occurring on railroads while engaged in interstate commerce. With this we do not agree. We think the phrase "in certain cases" was inserted in this title to obviate some of the defects suggested in the title of the act held unconstitutional in 207 U. S. 463. 52 L. ed. 297, 28 Sup. Ct.

Rep. 141, *supra*, and that the "certain cases" was meant to limit it to those cases where the liability arose in interstate commerce. The wording of the statute and the reasoning in these decisions lead inevitably to the conclusion that "the particular subject," "subject-matter," "field," or "chosen field" taken possession of by the Federal employers' liability act was the employer's liability for injuries to employees in interstate transportation by rail; and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in interstate commerce. The Federal employers' liability act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal employers' liability act—and that, too, regardless of the negligence or lack of negligence of either party to the litigation. Beyond question, the Federal employers' liability act superseded, as to injuries of employees engaged on railroads in interstate commerce, all statute or common law in force in the state of Illinois previous to the passage of the workmen's compensation act. That was the precise holding in *Wabash R. Co. v. Hayes*, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224. The legislature, in passing the Illinois workmen's compensation act of 1911, intended that wherever it was in force it should supersede all other state statutes and the common law as to the liability of employers for injuries to employees, for § 1 of said act provides, among other things, that any employer having elected to come within its provisions will "thereby relieve himself from any liability for the recovery of damages, except as herein provided." The United States Supreme Court takes that view of a similar compensation act in the state of Ohio in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, in which case, in referring to that state act, the court said: "It is one of the laws which has become more or less common in the states, and aims to substitute a method of compensation, by means of investigation and hearing before a board, for what was regarded as an unfair and inadequate system, based upon statutes or the common law."

The Illinois legislature, in passing the L.R.A.1916A.

act here in question, clearly understood that certain injuries occurring in interstate commerce should not be within the provisions of the act, for in § 2 it is provided that it should apply "in the business of carriage by land or water . . . (except as to carriers which shall be construed to be excluded herefrom by the laws of the United States relating to liability to their employees for personal injuries while engaged in interstate commerce, where such laws are held to be exclusive of all state regulations providing compensation for accidental injuries or death suffered in the course of employment)."

Counsel for plaintiff in error argue that the provision just quoted gives no greater force to the conditions therein set forth than would be given under the Federal employers' liability act independent of this provision in the Illinois act. Without question that is true; but this provision tends strongly to show that the state legislature did not intend to place within the provisions of the workmen's compensation act all injuries that occurred on railroads in Illinois, whether the injured person was engaged in intrastate or interstate commerce. This argument of counsel would logically lead to that conclusion. With this we cannot agree.

The conclusion we have reached is supported by the reasoning in *Wagner v. Chicago & A. R. Co.* 265 Ill. 245, 106 N. E. 809; *Patry v. Chicago & W. I. R. Co.* 265 Ill. 310, 106 N. E. 843, and *Devine v. Chicago, R. I. & P. R. Co.* 266 Ill. 248, 107 N. E. 595, where this court has had under consideration the construction of the Federal employers' liability act. The conclusion also finds support in the following cases: *Truesdell v. Chesapeake & O. R. Co.* 159 Ky. 718, 169 S. W. 471; *Cincinnati, N. O. & T. P. R. Co. v. Hill*, 161 Ky. 237, 170 S. W. 599; *Reeve v. Northern P. R. Co.* 82 Wash. 268, L.R.A.1915C, 37, 144 Pac. 63, 8 N. C. C. A. 167; *Lauer v. Northern P. R. Co.* 83 Wash. 465, 145 Pac. 606; *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952; *Schweig v. Chicago, M. & St. P. R. Co.* 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135. We think, also, the reasoning of the courts with reference to the Federal bankruptcy law, and the state statutes touching on the same subject, tend to support the same conclusion, as shown by the following, among other, authorities: *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Harbaugh v. Costello*, 184 Ill. 110, 75 Am. St. Rep. 147, 56 N. E. 363; 16 Am. & Eng. Enc. Law, 2d ed. 642, and cases cited.

Counsel for plaintiff in error insist that the conclusion we have reached concerning



the field covered by the Federal liability act is inconsistent with the holdings of the United States Supreme Court in certain decisions where the question has been considered as to whether the Federal and state statutes deal with the same identical subjects. They rely very strongly upon *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819. We do not consider that case in any way in conflict with the conclusions we have reached. It has been cited and referred to many times by the United States Supreme Court and more than once in the cases that we have heretofore cited. The principal holding of the court in that case, as we read the opinion, is, that the action of Congress as to the regulation of commerce or the liability for its infringement is exclusive of state authority; but until some action is taken by Congress, the legislation of a state not directed against commerce or any of its regulations, but generally to the rights and duties of citizens, is legal, although it may indirectly and remotely affect the interests of foreign and interstate commerce or persons engaged in such commerce. The late case of *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501, is one of the same class of cases. The Case of *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829, 832, where a statute of Georgia was upheld requiring locomotives engaged in interstate commerce to be equipped with electric headlights, so far as it applies to the facts in this case, has been effectually construed by the more recent decision of the United States Supreme Court in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, 446, 59 L. ed. 661, 665, 35 Sup. Ct. Rep. 304, 305. The field of legislation that was being discussed in the electric headlight case was not a liability for injury to an employee while engaged in interstate commerce, but whether the subject of electric headlights was in the field already covered by Federal legislation as to safety appliances. The question of the Federal employers' liability act was not considered or touched upon in that case. In none of the decisions cited and relied on by counsel for plaintiff in error was anything said that in any way limited or modified the doctrine laid down in the decisions heretofore considered, that Congress, by the Federal employers' liability act, intended to occupy the field of employers' liability to employees for all injuries occurring on railroads while engaged in interstate commerce. Under those decisions the conclusion is inevitable that in a suit to recover for an injury on a railroad, occurring while the employer and employee were engaged in interstate commerce, the Federal employers' liability act alone would control, and could L.R.A.1916A.

not be pieced out or supplemented by any state statute. The decedent having been engaged, at the time of his death, in interstate commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal employers' liability act.

Counsel for plaintiff in error argue that many of the injuries on railroads while engaged in interstate commerce occur without any negligence on the part of anyone, and that therefore the conclusion here reached will leave many injured employees—or, if the injury causes death, their relatives—without any opportunity for compensation, and is contrary to the spirit of the times, which demands humane legislation covering this subject. That argument may well be addressed to the Federal Congress. This court must confine itself to the proper construction and operation of this act, and cannot consider the evils which it is claimed will arise from the execution of the Federal employers' liability act, however real those evils may be.

It is suggested, but not argued in the briefs of counsel for plaintiff in error, that the rights and liabilities under the two acts here in question are in a sense cumulative, and that the payment of compensation under the state act would not bar an action under the Federal act, under the reasoning of the United States Court in *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 613, 56 L. ed. 911, 916, 32 Sup. Ct. Rep. 589, 592, 1 N. C. C. A. 892, and other like cases. Can the workmen's compensation act of Illinois, requiring compensation to be paid to employees by employers for injuries, be fairly included within the terms of § 5 of the Federal employers' liability act?

Workmen's compensation and industrial insurance laws had not been adopted in any of the states of this country in 1908, at the time the Federal employers' liability act went into effect. The first state act of that kind was passed in June, 1910, by the state of New York. Since then at least twenty-one other states have passed such laws. Harper, *Workmen's Compensation*, p. 6. Congress, therefore, did not have workmen's compensation acts particularly in mind when it drafted the Federal liability law. It is true that this court has held that when parties have elected to come under the workmen's compensation act of this state the provisions of that act thereby become a part of the contract of employment (*Deibeikis v. Link-Belt Co.* 201 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401), and therefore that contract might be included in the term "any contract," referred to in the first part of said § 5, but the contract referred to in that section is one that has been entered into for the purpose of enabling the common carrier "to exempt

itself from liability created" by the Federal employers' liability act. Surely it cannot be reasonably held that the workmen's compensation act is a contract entered into for that purpose. The words "insurance relief," "benefit," or "indemnity" would, none of them, in the connection in which they are used, seem to include the compensation to be paid under the workmen's compensation act. While that act is based upon the same general principles as workmen's benefit insurance, it would hardly be supposed that Congress, in said § 5, intended to cover such a compensation act as the one here under consideration. As already stated, the Federal liability act, in a certain sense, in some cases, at least requires the master to be an insurer of the safety of his employee, the same as does the workmen's compensation act. Having in mind the history of the legislation, both Federal and state, on the questions here under consideration, we can

reach no other conclusion, under the wording of said § 5, than that the Illinois workmen's compensation act was not intended to be included by Congress within any of the exceptions stated in said section. What has already been said heretofore in this opinion with reference to the intent of the Illinois legislature, in passing the workmen's compensation act, practically demonstrates that that body did not intend the remedy thereunder to be in any sense cumulative to the remedy provided for in the Federal employers' liability act. Congress could include workmen's compensation acts within the exception provided for in said § 5, but has not yet seen fit so to do.

The judgment of the Appellate and Circuit Courts must be reversed, and the cause remanded.

Petition for rehearing denied.

### **Annotation—Limitation of application of workmen's compensation statute by Federal laws.**

The extent to which the state workmen's compensation statutes are limited in their application by Federal laws is a subject upon which the state courts are in a decided conflict, and upon which there appears as yet to be no authoritative ruling by the United States Supreme Court. The application of the state acts has been held to be limited by two branches of Federal jurisdiction,—admiralty, and the jurisdiction given by the Federal employers' liability act, which affords a remedy to an employee of an interstate carrier by rail who has been injured by the negligence of the carrier, or of its officers, agents, or employees; but, as was said above, the state courts are not unanimous in their conclusion upon these points.

The holding in *STATE EX REL. JARVIS v. DAGGETT*, that a state cannot extend the provisions of a workmen's compensation act to injuries occurring on vessels on local waters within the admiralty jurisdiction of the United States, with respect to which Congress has established a measure of liability limited to the value of the owner's interest in the vessel and freight pending at the time of the injury, is contrary to the holdings of the courts of last resort in New York and Connecticut.

Thus, in *Re Walker* (1915) 215 N. Y. 529, 109 N. E. 604, it was held that the New York act applies to an injury to a workman occurring upon a navigable river, since by the Judicial Code of the United States, §§ 24 and 256, the admiralty jurisdiction is not exclusive, but L.R.A.1916A.

suitors are in all cases saved the right of a common-law remedy where the common law is competent to give it, and the compensation act is a substitute for this common-law remedy. The court said: "But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature. All in the same case are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act. A new remedy has been substituted for the common-law remedy, from which the employer is granted exemption."

And in *Kennerson v. Thames Towboat Co.* ante, 436, it was held that a provision for compensation for injuries, made part of a contract of employment between citizens of the state, which is to be executed in part upon the navigable waters outside the jurisdiction of the state, may be enforced in the state court, notwithstanding the injury occurred outside the state within the jurisdiction of the admiralty court.



A Federal district court has held that the Washington act does not prevent a workman injured while in the employment of a vessel, from proceeding in rem in admiralty to enforce a lien given by the maritime law. The *Fred E. Sanders* (1913) 208 *Fed.* 724, 4 N. C. C. A. 891. But the same court subsequently held that where an injured employee takes the benefit of the state act in lieu of his common-law remedy, he cannot thereafter pursue the remedy given by the maritime law. 212 *Fed.* 545, 5 N. C. C. A. 97.

A suit by a workman employed as a machinist to aid in the repair of a vessel in a dry dock, to recover compensation under the New Jersey act for injuries received while so engaged, is not one founded or sounding in tort, so as to be subject to the exclusive control of the maritime law. *Berton v. Tietjen & L. Dry Dock Co.* 219 *Fed.* 763. And it was held that the Federal court will not refuse to remand such a suit because the owner of the dock claimed the benefit of the section of the United States statute providing for limitation of liability in favor of the owners of vessels or ships, since a dry dock, although capable of floating and being towed from place to place, is not a vessel within the meaning of such statute.

A number of the state compensation statutes contain provisions to the effect that they apply to employers and employees in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or shall be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that the employer and his employees working only within the state may, subject to the approval of the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of the act in like manner and with the same effect in all respects as provided for other employers and their employees. These provisions of the New York act will be found in the opinion in *Jensen v. Southern P. Co.* ante, 403.

This section has been construed in a number of decisions.

Thus, in *Connole v. Norfolk & W. R. Co.* (1914) 216 *Fed.* 823, it was held that by § 51 of the Ohio act, the statute applied to interstate carriers only when the carrier and the employee in question were engaged in purely intrastate business.

ness, and then only when the carrier and any of the workmen have voluntarily elected to come in under the act; and where no averment is made in the petition that the employer and employee have so voluntarily elected, the petition will be stricken out. In speaking of this section of the Ohio act, the court said: "The section with certain changes, only one of which affects anything here under consideration, is the same as § 6604-18 of the Washington statute (*Rem. & Bal. Anno. Code Supp.* 1913). The only change that need be noted here is the substitution in the Ohio act of the words 'and then only when,' for the words 'except that any such,' occurring in that of Washington. The words in the Washington act enlarge the classes of persons to whom the act may apply, whereas the Ohio act restricts such classes. The one extends the application of the statute, and the other limits it. The Washington statute is plain and intelligible, but does not appear to have been construed."

And in *Kennerson v. Thames Towboat Co.* ante, 436, it was held that the exception in the Connecticut act relative to injuries arising in interstate or foreign commerce has reference only to the Federal employers' liability act, and does not apply to a death caused by the foundering of a tug without negligence on navigable waters of the United States.

And in *Jensen v. Southern P. Co.* ante, 403, it was held that the New York act applies to injuries received in interstate commerce so far as they are not included in the Federal employers' liability act.

The court said that in § 114 of the New York act, providing that "the provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established," etc., the words "may be" should be construed in the sense of "shall be," so as to make the legislature say that it did not intend to enter any field from which it had been or should in the future be excluded by the action of the Congress of the United States.

It was also held that the express provision for injuries received in long-shore work in one section of the workmen's compensation act excludes such injuries from the provisions of another section dealing with injuries received in the operation of vessels other than those of other states or countries used in interstate or foreign commerce.

A state workmen's compensation act may be made to apply to injuries received in interstate commerce so far as they are not provided for by the Federal act, or the state is not forbidden by Congress to provide for such injuries. So that, Congress having in no way legislated in regard to interstate commerce by water, the state has a right to enact laws incidentally affecting such commerce. *Stoll v. Pacific S. S. Co.* (1913) 205 Fed. 169, 3 N. C. C. A. 606, approved in *Kenneron v. Thames Towboat Co.* ante, 436.

And the Federal employers' liability act, applying to carriers by railroad only, does not apply to injuries received upon a steamboat operated by an interstate railroad, but not related to its rail transportation. *Jensen v. Southern P. Co.* ante, 403.

Nor does it apply to a railroad company whose sole relation to the employee is as a lessee of a canal on which the said employee worked for wages paid by the railroad company. *Hammill v. Pennsylvania R. Co.* (1915) — N. J. L. —, 94 Atl. 313.

There is a sharp conflict of authority between the courts upon the question whether or not the state compensation act applies to injuries of employees of interstate carriers by rail, where the injuries were received while the employee was himself engaged in furthering interstate commerce.

The decision in *STALEY v. ILLINOIS C. R. Co.* very clearly expresses the position of those courts which hold that the state acts cannot in any case apply to injuries of employees of interstate carriers by rail, where the employee when injured was himself furthering interstate commerce, although the injury may not have been caused by the negligence of the employer, and consequently no recovery could be had under the Federal act.

Several decisions of the California court are to the same effect. Thus, the California compensation act does not cover the case of a special watchman employed by a railroad company, who after driving trespassers off an interstate train, dismounted from the train and started to pursue the men in order to drive them from the company's property, and was injured by the explosion of a cartridge in his revolver, which had fallen on the ground. *Smith v. Industrial Acci. Commission* (1915) 26 Cal. App. 560, 147 Pac. 601. After quoting from the decision of the United States Supreme Court in *Michigan C. R. Co. v. Vreeland* (1913) 227 U. S. 59, 57 L. L.R.A.1916A.

ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, the court said: "The express declaration in these decisions that the Federal statute has taken hold of the entire subject of the liability of a common carrier engaged in interstate business, to its employees for accidental injuries suffered by the latter while performing their duties, makes it unnecessary to digest those decisions approving the operation of the state statutes where the national legislation is not of such a character as to indicate that Congress intended to cover the whole field. There are such decisions, and they give expression to the general rule that a state statute enacted under the right of the reserve power is not to be set aside or overridden by the law of Congress, unless there is an actual repugnance. But these decisions recognize the alternative condition that such state statutes will be thus overridden where Congress has manifested a purpose to exercise its paramount authority over the subject."

So, in *Southern P. Co. v. Pillsbury* (1915) — Cal. —, L.R.A.—, 151 Pac. 277, the supreme court of California annulled an award of the Industrial Accident Commission upon the ground that the employee was at the time of the injury "engaged in interstate commerce within the meaning of the Federal act." In this case it does not appear in the opinion whether or not the plaintiff's injury was caused, or was alleged to have been caused, by the negligence of the railroad company.

In *Young v. Duncan* (1914) 218 Mass. 346, 106 N. E. 1, the court said that the Massachusetts act probably did not embrace employees subject to the Federal employers' liability act.

On the other hand, the New Jersey court has held that the Federal employers' liability act does not prevent the applicability of the New Jersey workmen's compensation act in the case of an injury to a brakeman on an interstate train, since the two acts deal with entirely separate matters. *Rounsaville v. Central R. Co.* (1915) — N. J. L. —, 94 Atl. 392.

So, it has been held that the fact that a deceased workman was engaged in furthering interstate commerce at the time of his death does not prevent his dependents from recovering compensation under the New Jersey act. *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915) — N. J. L. —, 95 Atl. 753.

In neither of the above cases is it shown whether the injury was caused by the negligence of the employer or not.

The Federal employers' liability act



does not prevent the operation of a state compensation act in a case in which no claim of negligence on the part of the employers could be made. *Hammill v. Pennsylvania R. Co.* (1915) — **N. J. L.** —, 94 Atl. 313. The court said: "The Federal and state acts are not in pari materia. The one is an act creating a liability to the employee as in tort, based upon common-law negligence, or the failure to comply with some statutory provision for the safety of the employee; the other, so far as its § 2 is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation, and quite irrespective of any question of negligence on the part of the employer. It was manifestly intended, among other things, to give relief in just such cases as the present one, where no claim of negligence on the part of the employer could reasonably be made. As to this class of cases, at least, we deem the Federal act not to be exclusive. The authorities cited by prosecutor will be found to involve in each case a conflict between the Federal act and a state act imposing a liability as in tort for a breach of a statutory or common-law duty."

The New York court of appeals has also held that the state act was applicable to injuries to employees of interstate carriers by rail, although such employees were themselves engaged in furthering interstate commerce, if the injuries were not received because of the negligence of the carrier. *Winfield v. New York C. & H. R. R. Co.* (1915) 216 **N. Y.** 284, 110 **N. E.** 614, affirming 168 App. Div. 351, 153 **N. Y. Supp.** 499. After pointing out that the Federal act was based solely upon negligence, and that under the state act the negligence of the employer was immaterial, the court said: "We think it is evident, also, that Congress has recognized the difference between these two kinds of statutes. In enacting the Federal employers' liability act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that Congress intended to observe the distinc-

L.R.A.1916A.

tion between the two kinds of statutes referred to is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to Federal employees, in which liability is not made to depend either upon fault or contract (35 Stat. at L. 556-558, chap. 236, Comp. Stat. 1913, §§ 8923-8929), whereas, as to certain private employments, it has regulated the subject only in those cases where the employee is injured as the result of negligence (35 Stat. at L. 65, chap. 149). The workmen's compensation statute of this state was not in any way designed to conflict with the authority of Congress over interstate commerce. As was said by this court in *Jensen v. Southern P. Co.* ante, 403, 'Its obvious purposes was to guard against a construction violative of the Constitution of the United States.'

An employee of a railroad company located and operated within the state, who was at work on the repair of a car, is under the protection of the state compensation act, and not under the employers' liability act, since he was not engaged in furthering interstate commerce at the time of the injury, although the car had been used in both interstate and intrastate commerce. *Okrzsezs v. Lehigh Valley R. Co.* (1915) — App. Div. —, 155 **N. Y. Supp.** 919. It should be stated that no attempt has been made to gather the cases which merely determine whether or not an employee was at a certain time engaged in interstate commerce, although the indirect purpose of such a determination was to decide whether the Federal or the state act applied.

The state compensation act does not limit in any way the amount of recovery by an injured employee who sues under the Federal employers' liability act. *Grybowski v. Erie R. Co.* (1915) — **N. J. L.** —, 95 Atl. 764.

There has been no authoritative ruling by the United States Supreme Court upon this question. It would seem, however, that the decision in *STALEY v. ILLINOIS C. R. Co.* is more reasonable than the position taken by the New York court in the *Winfield Case*, supra. The United States Supreme Court had said in a comparatively large number of decisions that, Congress having acted upon the relationship of employers and employees in the case of interstate carriers by rail, all state legislation is superseded. It is true that the Federal act furnishes a remedy only where the carrier has been negligent, and that the Supreme Court has decided that the Federal act superseded the state acts only

in cases where the state acts attempted to impose a liability for negligence.

One of the main grounds for upholding the constitutionality of the compulsory statutes is that they cover the entire field of the liability of employers for injuries to employees, and that, while they impose additional burdens on some employers, they relieve those employers and all others from the danger of suit for damages. However, under the decisions of the New York, New Jersey, and Connecticut courts, an interstate carrier by rail, although he may have paid his contribution into the insurance fund, or become insured in some other way, is not freed from other liability, but is

subject to a suit for damages in case the injury has happened because of his negligence. From the same point of view the employer is not freed from other obligations where the injury was of such a character that his property may be proceeded against in admiralty. Thus, if the above named courts are correct in saying that the compensation laws apply notwithstanding the employee is within the provisions of the Federal employers' liability act, or if the case is one in which admiralty has jurisdiction, it would seem that one of the strongest grounds for upholding the constitutionality of the statutes is removed.

W. M. G.

## WISCONSIN SUPREME COURT.

CITY OF MILWAUKEE, Appt.,  
v.

HENRY MILLER et al., Respts.

(154 Wis. 652, 144 N. W. 188.)

### Master and servant — workmen's compensation — burden on consumer.

1. An employee, in the course of his service, received an injury to a great toe. Without notice to the employer of his needing medical and surgical treatment, and desiring to have such employer furnish the same, the employee procured such treatment, lasting ninety days. Notice was not given the employer at any time, except that the employee claimed compensation for his loss. Thereafter the former tendered the latter services of a competent physician and surgeon, but the latter chose to continue to be treated by the person of his choice, who was assisted by the employee's niece. She voluntarily, and without promise or expectation of compensation, acted as nurse. In due course the Industrial Commission awarded reparation for the loss, including \$222, for medical and surgical treatment, and \$32 for services of the nurse. Principles of §§ 2394—1-2394—71, Stats. 1911 (workmen's compensation act), apply as follows: By the logic of the workmen's compensation act personal injuries to employees are a natural element in the cost of production, and are necessarily paid by the consumers of the things produced.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — burden on public.

2. The workmen's compensation act is to minimize personal injury, distress, and loss,

Headnotes by MARSHALL, J.

Note. — For annotation on the workmen's compensation acts, see post, 23.  
L.R.A.1916A.

and so the burden upon the public as well as on the person injured, recognizing that such loss as legitimately enters into the cost of production as wages.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Statute — construction — broad interpretation.

3. In construing a statute which is referable to the police power, and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system, the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be embodied in the enactment, and the effects and consequences as regards responding to the prevailing conception of the necessities of public welfare, should be considered and the enactment given such broad and liberal meaning as can be fairly read therefrom so far as required to effectively eradicate the mischiefs it was intended to obviate.

*For other cases, see Statutes, II. a, in Dig. 1-52 N. S.*

### Master and servant — workmen's compensation — cost of production.

4. Proper administration of the workmen's compensation act requires appreciation of the manifest legislative purpose to abolish the common-law system regarding injuries to employees as unsuitable to modern conditions and conceptions of moral obligations, and erect in place thereof one based on the highest present conception of man's humanity to man and obligations to members of the employee class,—one recognizing every personal loss to an employee, not self-inflicted, as necessarily entering into the cost of production, and required to be liquidated in the steps ending with consumption.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — determination of public burden.

5. In dealing with a personal injury claim under the workmen's compensation act, the



logic and makeweights formerly supposed to justify penalizing employers as wrongdoers, to the ultimate expense of consumers, should not be allowed to play any part; but the directly responsible party should be regarded as standing for the aggregate of consumers and joining with the injured person in submitting to the sound judgment of impartial administrators the question of how much, under all the circumstances, by legislative standards, should the public be burdened as a reparation to such person or his dependents for his or their loss.

*For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

#### Same — surgical aid.

6. The amount allowed for reasonable expenses of medical and surgical treatment should be the fair value of the service as such,—neither more nor less because of the employer being liable therefor.

*For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

#### Evidence — burden of proof — value of surgical treatment.

7. The burden of proof to establish to a reasonable certainty the reasonableness of charges for medical and surgical treatment under the workmen's compensation act is on the employee; and, in case of the proof being insufficient, the claim should be reduced sufficiently to cure the infirmity.

*For other cases, see Evidence, II. m, in Dig. 1-52 N. S.*

#### Same — right to disregard.

8. The reasonableness of an employee's claimed expenses reasonably incurred for medical and surgical treatment being disputed by credible evidence, and not supported other than by opinion evidence of the person most interested, the trial tribunal should apply ordinary common sense and experience to the matter,—not being bound or necessarily efficiently influenced by the verification by such interested one,—and fix the allowable amount at such sum as appears to it to be reasonable; and where the claim is obviously exorbitant, should not allow it, in the whole, regardless of how strongly supported by evidence from the mouth of the interested party.

*For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.*

#### Master and servant — workmen's compensation — right of employer to select physician.

9. The right of the employer under the workmen's compensation act to furnish reasonably necessary medical and surgical treatment, and the provision creating liability to the employee for reasonable expense incurred by him, or in his behalf, in that regard, in case of the former unreasonably neglecting or refusing to make the proper provision, by necessary implication reserves to the employer, under ordinary circumstances, reasonable opportunity to exercise the privilege, and renders competency of the employee to obtain such treatment, or for the same to be obtained in his behalf, at the expense of the employer, contingent

upon such opportunity having been accorded.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — time to exercise.

10. The privilege accorded the employer, as stated, requires, as an incident, reasonable time to exercise it after notice of the need therefor.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — ad interim treatment.

11. The stated rules do not militate against competency of an injured employee to obtain medical and surgical treatment at the expense of his employer in the interim between the happening of the injury and time for notice to the employer of the employee's needs.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — duration of employee's privilege.

12. Competency of an injured employee to procure medical and surgical treatment, or for such to be procured in his behalf, at the expense of the employer, under the workmen's compensation act, exists for the reasonable time after the injury required for such employee to afford the employer opportunity to exercise his privilege; it is then suspended if the employer exercises such privilege, but revives and relates back to the time of suspension, if necessary, if the employer unreasonably neglects or refuses to exercise such privilege.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — interest of employer — conservation.

13. The legislative idea in the workmen's compensation act is that an employer is so specially interested in his injured employee being restored as soon as practicable, as to be most likely to provide proper medical and surgical treatment, and the letter and spirit of the law require that such beneficial and manifestly economic phase of the enactment should be given its intended dignity.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — duty to discover injury.

14. The law does not cast upon employers the duty of active vigilance to discover cases of personal injury to their employees, but casts upon the latter such vigilance as they can reasonably exercise to bring such injuries to the attention of employers, with their need and desire for medical and surgical treatment to be provided.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

#### Same — expenses of nurse.

15. Expense for service of a nurse, as such, is not allowable against the employer for the period of ninety days after the injury, or at all during such period, except as a part of reasonably necessary medical

and surgical treatment prove to be such by the physician and surgeon in attendance. *For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

**Same — termination of allowance.**

16. Expense for services of a nurse, as such, after the first ninety days, is not chargeable to the employer, nor at all thereafter except by allowance of the maximum percentage of disability indemnity.

*For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

**Same — voluntary aid — effect.**

17. The common rule in the law of negligence that the wrongdoer cannot mitigate his liability by taking advantage of relief furnished by one's wife, family, friends, or otherwise, has no application to cases under the workmen's compensation act. That eliminates all penalizing features and limits compensation to the injured person, aside from indemnity disability, to expenses or liabilities actually incurred.

*For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

**Same — burden on product.**

18. The legislative requirement that the employer shall bear the burden of reasonably necessary medical and surgical treatment of his injured employee was not intended as a charity to one, or as a penalty as to the other, but as the recognition of the economic truth that such expense is a legitimate element in the cost of production, and should be placed upon the product as directly as practicable, using the employer as a necessary first step in that regard.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(October 28, 1913.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Dane County sustaining an award of the Industrial Commission to defendant Miller for a personal injury which occurred to him while in the performance of his duties as an employee of the plaintiff city. Modified and affirmed.

**Statement by Marshall, J.:**

The Industrial Commission, in due course, awarded Henry Miller, under the provisions of the workmen's compensation act, on account of a personal injury to him which occurred while he was in the performance of his duties as an employee of the city of Milwaukee, \$222 for physician's services, \$32 for expense incurred for services of a nurse, \$5 paid out for bandages and supplies, and \$172.50 for disability indemnity. An action was brought in the circuit court for Dane county to test the decision as to the first two items, resulting in the award of the Commission being sustained.

One of Miller's great toes was severely injured by a road roller. The member was so lacerated and the bone known as the first L.R.A.1916A.

digit so badly crushed that amputation became necessary. The wound becoming somewhat infected, recovery was slow because thereof and the man's age and condition of health. He resided in the house with two relatives, a niece and her mother. The former acted voluntarily as nurse, and without promise or expectation of compensation. Miller did not, at any time, notify the municipality of his needing services of a physician or nurse, or give the corporation any opportunity to furnish such services. He did not notify it of his injury until October 21, 1912, three weeks after it happened. The notice then given was in the ordinary form for claiming compensation for his loss. He called Dr. Bradstad to treat him on the day of the injury. The amputation took place eleven days thereafter. November 17th, after the city received the notice aforesaid, it voluntarily tendered Miller the services of Dr. Carroll, a competent physician. Notwithstanding such tender Miller continued to employ Dr. Bradstad. From the time of such tender to the end of Dr. Bradstad's period of service, Miller knew that the city was ready at any time to furnish him with the services of a physician. He unnecessarily retained Dr. Bradstad for the full period of ninety days. The latter, in his bill as allowed by the Commission, charged for a visit to the patient and dressing of his injured member on some 135 occasions during ninety days, as indicated by the following copy of such bill:

October 1, 1912.	Surgical dressing and	
" 2, "	Amp. Redundant Tissue \$	2 50
" 2, "	Dressing	1 50
" 2, "	"	1 50
" 4, "	"	1 50
" 4, "	"	1 50
" 5, "	"	1 50
" 6, "	"	1 50
" 7, "	"	1 50
" 8, "	"	1 50
" 9, "	"	1 50
" 10, "	"	1 50
" 11, "	"	1 50
" 11, "	Amputation of toe	30 00
" 11, "	Anæsthetic	5 00
" 12, "	Call	1 50
" 12, "	"	1 50
" 13, "	"	1 50
" 14, "	"	1 50
" 15, "	Dressing	1 50
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October	26, 1912, Dressing	\$1 50
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November	1, " "	1 50
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December	1, " "	1 50
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"	31, " "	1 50

\$222 00

November 30th, after the tender of services of Dr. Carroll, the city caused written notice to be served on Miller that it would not pay for services of any physician except those L.R.A.1916A.

rendered by its own selection. Dr. Bradstad verified the reasonableness of his bill. Dr. Carroll, under oath, condemned it, saying that \$50 to \$75 was ample for such a case. The Commission regarded Dr. Bradstad's charges quite large, but accepted his evidence as sufficient to sustain his claim, notwithstanding the evidence of Dr. Carroll, since, as it viewed the matter, the injury was quite serious and Bradstad, because of greater experience than Dr. Carroll, was the best judge of the matter.

Messrs. Daniel W. Hoan and W. H. Timlin, Jr., for appellant:

There can be no recovery for services rendered voluntarily, and with no expectation at the time of rendition that they will be compensated; and this is true whether the services were or were not beneficial.

15 Am. & Eng. Enc. Law, 1079; Ellis v. Cary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; Wells v. Perkins, 43 Wis. 160; Bostwick v. Bostwick, 71 Wis. 273, 37 N. W. 405.

Messrs. W. C. Owen, Attorney General, and Byron H. Stebbins, Assistant Attorney General, for respondents:

The award of the Industrial Commission should not be disturbed if the testimony shows that "there is a substantial basis for the decision."

Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905.

An employer failing to provide in some way for medical treatment "neglects" to provide it in the sense that he fails or omits to do so. "To neglect to do a thing means to omit to do it—not to do it."

Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Kimball v. Rowland, 6 Gray, 224; Robertson v. Northern R. Co. 63 N. H. 544, 3 Atl. 621; Donahue v. Gunter, 151 Wis. 125, 138 N. W. 51.

Nursing is included under the head of "medical and surgical treatment."

Scott v. Winneshiek Co. 52 Iowa, 579, 3 N. W. 626.

The reasonable value of nursing gratuitously done by a member of one's family may be included in compensation as part of the "reasonable expense incurred" by the injured employed in providing medical and surgical treatment.

13 Cyc. 63, 64; 8 Am. & Eng. Enc. Law, 2d ed. 645, 646; Crouse v. Chicago & N. W. R. Co. 102 Wis. 196, 78 N. W. 446, 778; Johnson v. St. Paul, & W. Coal Co. 131 Wis. 627, 111 N. W. 722; Hulehan v. Green Bay, W & St. P. R. Co. 68 Wis. 520, 32 N. W.

529; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555.

The burden of proving that services of a nurse were rendered gratuitously is on the party seeking to escape payment therefor.

*Link v. Chicago & N. W. R. Co.* 80 Wis. 304, 50 N. W. 335; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068; 40 Cyc. 2816; *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835; *Taylor v. Thieman*, 132 Wis. 38, 122 Am. St. Rep. 943, 111 N. W. 229; *Broderick v. Broderick*, 28 W. Va. 378; *Diehl's Appeal*, 2 Legal Gaz. 113; *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622; *Hay v. Walker*, 65 Mo. 17; *Christianson v. McDermott*, 123 Mo. App. 448, 100 S. W. 63; *Neale v. Engle*, 4 Sadler (Pa.) 1, 7 Atl. 60.

The nurse's intention in the matter is immaterial for the further reason that she is a minor, so that even a definite agreement to accept less than the reasonable value of her services (or nothing) was not binding on her or on her mother, the latter being entitled to her daughter's earnings.

29 Cyc. 1624; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Gale v. Parrot*, 1 N. H. 28; *James v. LeRoy*, 6 Johns. 274; *Cook v. Husted*, 12 Johns. 188; *Weeks v. Holmes*, 12 Cush. 215; *Sherlock v. Kimmell*, 75 Mo. 77.

An infant's contract, if prejudicial to his interests, is not binding on him or on his parents.

*Davies v. Turton*, 13 Wis. 185; *Mountain v. Fisher*, 22 Wis. 93.

**Marshall, J.**, delivered the opinion of the court:

This appeal presents a very important question of fact and several of statutory construction. Their significance is not measured, merely, by effect of their solution in the particular instance. Such solution will probably materially affect many present, and, necessarily, many future situations with which the Industrial Commission will have to deal. It may affect the integrity of the law itself as regards whether the beneficent purposes for which it was originated shall be realized.

A law, however much needed for the promotion of the public welfare, and however wisely framed, may be made so unsatisfactory by the spirit of it not sufficiently pervading its administration, as to largely defeat its purpose and create danger of its abrogation and a return to the distressing situations which gave rise to the effort for relief. Any such result in the particular instance would be such a public calamity that everyone in authority having to do with determining the precise scope of the law, in letter and spirit, and applying it, L.R.A.1916A.

should be alert, at all times, to the importance of not affording any reason to attempt such result, and of making the wisdom embodied in the legislation so significant that no considerate person will indulge the thought of even a partial backward step toward the old system, characterized by incalculable waste, to the detriment of every consumer of the products of human energy; by distressing unequal distribution of misfortunes incident to necessary industrial pursuits, particularly misfortunes to employees by personal injury losses; by a lowering tendency of moral standard in the making and enforcing claims for such losses, and by perversion of human perceptions of individual responsibility in such cases. The law is a long step towards an ideal system requiring every consumer of any product of human industry, as directly as practicable, to pay his ratable proportion of the fair money cost of those things which he necessarily, or reasonably, destroys in conserving his life and welfare,—personal injury losses, not intentionally incurred,—losses whether through the fault of the employer or employee, or without fault of either, being considered as legitimately an element of such fair money cost as expenditures for raw material, for machinery or wages.

The foregoing seems legitimate as indicating the atmosphere, so to speak, in which the questions here presented, especially those of statutory construction, should be examined. The conditions giving rise to as law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conceptions of the necessities of public welfare, play an important part in shaping the proper administration of the legislation. In the aggregate, they sometimes shed very efficient light in aid of clearing up obscurities as to the legislative intent. The administrative commission and the courts should fully appreciate that and be imbued with and guided by the manifest intent of the law to eradicate, utterly, the injustice to employers and employees, and the public as well, of the old system, and to substitute in its place an entirely new one based on the highest conception of man's humanity to man and obligation to industry upon which all depend; recognizing the aggregate of its attending accidents as an element of cost to be liquidated and balanced in money in the course of consumption,—a system dealing with employees, employers, and the public as necessarily mutual participants in bearing the burdens of such accidents, displacing the one dealing only with the class of injuries happening through in-



advertent failure, without real moral turpitude, to exercise average human care, and placing employee and employer, whose interests are economically the same, in the false position of adversaries, to the misfortune of both and the public, intensified by opportunity for those concerned as judicial assistants to profit by such misfortunes. Most lamentable it will be, if this new system—so freighted with hopes for the minimizing of human burdens and their equitable distribution—shall not endure and be perfected to the best that human wisdom can attain.

In the light of the foregoing it would seem that such a situation as the one presented by the claim for physician's services in this case should be viewed with eyes blinded, so to speak, to the competency of the party claimed of to pay, and without a thought that the latter can legitimately be mulcted as a wrongdoer, in the moral sense, or should be required to pay more or less according to wealth, situation, or status. Results should not afford any good reason for apprehending that those influences popularly supposed to formerly have unduly characterized recoveries by jury interference still play an efficient part. The directly responsible party should be regarded as voluntarily joining with the injured person in submitting to the sound judgment of impartial men the question of how much, under the circumstances, by legislative standards, should be rendered by one to the other as reparation for his loss.

Manifestly, in case of a claim such as the one in question, the amount allowed should not be more merely because of a municipality being directly responsible than in case of the person treated having to bear the burden. What services were reasonably necessary and what is a fair compensation therefor are the only legitimate inquiries. In case of grave doubts as to the amount, and the truth of the matter resting, as here, solely on the word of the interested party, opposed by the evidence of another competent to testify, and of little or no interest in the result, there should be much hesitation, and generally refusal, to resolve it wholly against the party from whom the recovery is sought. The burden of proof should be regarded as on the claimant to establish his claim with reasonable certainty, and circumstances or evidence impairing such certainty should incline triers to reduce the amount claimed sufficiently to place it safely within the boundaries of reason.

Viewing Dr. Bradstad's claim as above indicated, it so shocks our common sense and standard of what is reasonable and fair as to leave no room for approving the Commission's finding, though confirmed by the L.R.A.1916A.

circuit court. We are constrained to think that the matter was not viewed, either in the first instance or on review in the circuit court, from precisely the angle above indicated. It seems preposterous that an injury to a great toe, even of such severe nature as to require amputation and careful attention for some days to eradicate or prevent infection and create proper conditions for recovery, could reasonably require over 130 visits and dressings during a period of ninety days, notwithstanding the presence of an attendant competent and willing to carry out the physician's directions as to caring for the injured member. In looking over the Bradstad claim as it appears in the statement of facts, one can but marvel that it was exhibited to such a board as the Industrial Commission for approval, especially with any thought of its being allowed in full.

It will be noted that there were two visits and two dressings nearly every day for the first sixty days. That most of such service could have been efficiently performed by any fairly intelligent attendant under the directions of the physician, he being easily within reach in case of there being any special reason for his presence, needs no evidence other than our own common sense and common experience in life. It must be remembered that trial tribunals are not, necessarily, bound by the testimony of experts merely because of their special knowledge. One who, by reason of such knowledge, is competent to give opinion evidence, may deal in such exaggerations, especially when they favor his selfish interests, as in this case, as to render his evidence of little or no value, even when opposed by evidence from the mouth of any other witness. *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 331, 80 N. W. 644, 6 Am. Neg. Rep. 746; *Bucher v. Wisconsin C. R. Co.* 139 Wis. 597, 120 N. W. 518. It has been often said that that opinion evidence is not conclusive in any case; that if it is not within the scope of reason and common sense it should not be regarded at all. Triers circumstanced like the Industrial Commission have a right and duty to apply their own common sense and experience to such a situation as existed here, and not to allow a claim which appears manifestly exorbitant merely because verified by the person to be benefited by its allowance. No more should have been allowed in this case than would appear to a reasonable certainty fair in case of the injured man being responsible for payment without any right to reimbursement.

What has been said would require a large reduction of the allowance for services of the physician, if the solution of questions

yet to be considered should leave any room for allowing the claim at all. Notwithstanding such solution must eliminate the Bradstad claim entirely from the case, as will be seen, it has seemed that we ought not to decide the matter without passing upon the merits of the decision below, and not to let the opportunity pass for speaking of the requirements of the law as to the manner of dealing with such claims,—affording guidance for administrative efforts. That the Commission has labored hard to respond to the duties imposed by law, and has, in general, won distinction for rapidly and satisfactorily disposing of a multitude of cases, and demonstrating the wisdom of the new system, may be fairly conceded without militating against the thought that judicial suggestions in the interests of administrative efficiency will be welcomed.

The next question presented involves a very important feature of the workmen's compensation law. Failure to preserve the integrity of such feature and to give effect thereto in letter and spirit would go far toward bringing discredit upon the new system by appearance that some of the significant infirmities and abuses incident to the old system are incident as well to the new.

Formerly there was a somewhat popular notion, and by no means not without good ground therefor, that misfortunes of injured employees were often exaggerated and made unnecessarily burdensome to their employers by such employees, their lawyers and doctors combining to that end, and generally to the great detriment of employees and employers, and the public as well. It may well be that such instances were exceptional rather than common, though there was enough of basis for such popular idea to regrettably cast discredit upon the learned professions. To rescue such professions from such discredit and remove opportunity for selfishly exploiting the misfortunes of employees at the expense of their employers and the public, careful provision was made to protect claimants from court costs and attorney's charges and employers from false claims and fraudulent or needless prolongation of disability, while recognizing that the expenses incident to surgical and medical attention to an injured person are a necessary part of his reparable loss. To that end it was provided by subdivision 1, § 2394—9 of the compensation act that "where liability for compensation under this act exists the same shall be as provided in the following schedule: "(1) Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury and thereafter during the L.R.A.1916A.

disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer; and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

The purpose of that provision is manifest; but if it were otherwise the report of the legislative committee which drafted the law would remove all possible doubt. In that, as indicated by appellant's counsel, we find the following: "The employer must provide medical and surgical treatment, medicine, etc., for ninety days. This provision is made for two reasons: First: As a rule, an employer is more competent to judge the efficiency of the doctor employed and to provide efficient medical and surgical treatment. Second: It is to the interest of the employer to furnish the very best medical and surgical treatment, so as to minimize the result of the injury and to secure as early a recovery as possible. The more serious the result of the injury, the more the employer must pay. Also by this means he obtains a complete knowledge of the exact condition of the injured employee."

Thus, the burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him, and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for other's benefit. If the advantages to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore, in case of a personal injury to an employee in the line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual interests of the two parties to the misfortune by supplying the medical and surgical needs of the injured.

The logic of the foregoing is plainly this: It is the duty of an injured employee who needs, or supposes himself to need, medical and surgical treatment, to give his employer reasonable notice thereof. The privilege of the latter, necessarily, implies the right to reasonable opportunity to exercise it.



Such opportunity should ordinarily be accorded by the act of the injured man, not secured by the employer keeping in his service a physician and surgeon charged with the duty of discovery. Note, that the employer is not made liable for the reasonable expenses incurred by or on behalf of the employee in providing medical aid and surgical treatment, except in case of "neglect or refusal seasonably to do so." This language, as indicated, by necessary inference, implies that he shall have reasonable notice of the employee's need of treatment and desire and willingness for him to act in the matter. The idea indulged in below, that the provision casts a duty on the employer of active vigilance to discover the necessities of injured employees, such as by keeping a physician and surgeon constantly employed and on the alert to make discoveries, we do not find in the law in letter or spirit. On the contrary, we find such idea plainly negated by the language and purpose of the enactment. The legislature, certainly, never dreamed of casting any such burden on employers as that suggested by the Commission in its decision. To give the law the contrary cast by administration would defeat one of its most valuable safeguards and open up a very inviting field for the medical profession to win discredit,—one which doubtless its members having high ideals would gladly have closed, and which justice to employer, employee, and the public demands shall be closed.

The result is that Miller, since he failed to notify his employer of his needs, never had competency to employ a physician at the expense of the city of Milwaukee, except for such reasonable length of time as necessarily intervened between his injury and reasonable opportunity after due notice for the city to exercise its privilege. The time could not have been long. How long, it is impossible to determine from the record. It is quite certain that Miller voluntarily selected Dr. Bradstad to treat him,—not knowing, probably, of the municipality's privilege in the matter. That is his misfortune, and, however much it may be regretted, it is far better that the integrity of the law be not invaded than that it be impaired in the slightest degree in the particular instance to avoid the consequence of his not knowing or appreciating its requirements.

The services of the nurse for which \$32 were allowed were rendered during the first four weeks after the injury. It is noticeable that, notwithstanding Dr. Bradstad

visited his patient twice each day for some forty days thereafter, the recovery had so far progressed that services of a nurse were considered unnecessary. The scheme of the legislature included definite specifications of just what burdens an employer shall bear for the benefit of his injured employee. No mention is made in such specifications of services of a nurse during the first ninety days. Therefore, compensation of that sort must be regarded as not within legislative contemplation, except as included in the term "medical and surgical treatment . . . reasonably required." It has become so common for a physician or surgeon to have a nurse as his assistant, in cases requiring attention at shorter intervals than he can well be present, that the major service may well be regarded as including the minor attention in all cases where a nurse is employed by the physician or surgeon, or by his direction, and the services are an incident of the treatment; and that would obtain whether the medical or surgical attendant is engaged by the employer or employee. In neither case is there any warrant in the law, as it seems, for allowing compensation for services of a nurse, other than incidental to medical or surgical attention, during the ninety days immediately succeeding the injury.

We do not fail to note counsel's claim that services of a nurse are inferentially provided for in subdivision 1 of § 2394—9, as evidenced by the allowance for like services by this language of subdivision (a) of subdivision 2 of such section: "Provided that, if the disability is such as not only to render the injured employee entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to 100 per cent of the average weekly earnings."

That plainly indicates that the legislature did not intend to make nurse's services compensable as such, except contingently and by the allowance of 100 per cent of the average weekly wages instead of 65 per cent. Manifestly, double expense for nurse's services could not have been contemplated. Therefore, in case of the full allowance of 100 per cent of the weekly wages under subdivision (a) no further compensation for nurse's services could be allowed as included in medical and surgical treatment, except during the eight-day interim between the date of the injury and commencement of the compensable disability period; but, in any case, good administration would require, it

seems, that the necessity for services of a nurse should be certified to by the attending physician or surgeon, as a prerequisite to its allowance either as an incident to the medical or surgical treatment or greater allowance for disability indemnity.

What has been said, sufficiently for the case, disposes of the claim for services of a nurse; but another reason is advanced why the allowance should not have been made here under the circumstance that the service was voluntarily performed by a relative of Miller, who resided in the house with him, without promise or expectation of compensation. The fact that she was a minor makes no difference. Whatever she did was done substantially in the presence of her mother, and, evidently, with the latter's sanction. As the mother was a nearer relative of Miller than the niece who performed the service, if the question of whether the attention is compensable as a legal liability be referable to the attitude of the former, the inference is all the stronger that the same was intended to be gratuitous.

The Commission probably applied the rule in negligence cases that he who is liable for damages for a tortious injury cannot mitigate the amount of the recovery by taking advantage of the gratuitous services or loving care of family or friends. *Hulehan v. Green Bay, W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529; *Crouse v. Chicago & N. W. R. Co.* 102 Wis. 196, 205, 78 N. W. 446, 778; *Johnson v. St. Paul & W. Coal Co.* 131 Wis. 627, 111 S. W. 722.

The line of cases referred to and the rule deducible therefrom is very familiar; but it is by no means clear that they apply to the circumstances before us. The rule is grounded, not on a statutory liability, but the common-law principle that he who tortiously injures another in his person or his property incurs a legal liability to make good to that other all the loss which is directly and naturally caused thereby, regardless of any element of reasonable anticipation of consequences. This extreme and rather harsh rule is characterized by a penal element, grounded on the moral turpitude of the wrongful act. Under the statutory system for dealing with personal-injury losses incident to performance of the duties of an employer, they are regarded as mutual misfortunes, to be charged up, as directly as practicable, to the cost of production. The right to have the employer regarded as an agency to make payment to the employee and absorb the same as an expense of the industry, regardless of whether the loss is attributable to any human fault, is a legislative creation within the constitutional ex-

ercise of the police power to legislate for the public welfare. It is not a charity, but the recognition of a moral duty and the erection of it into a legal obligation of the public, not of the mere employer, to compensate reasonably those who are injured while in the employment of others, as a part of the natural, necessary cost of production; that obligation being discharged through the agency of the employer.

Thus the reason of the old rule applicable to wrongs does not furnish any sound basis for allowing compensation for the services of a nurse under the circumstances of this case. The beneficence of the law in recognizing moral duty goes no further than its specifications, read in the spirit of the enactment. That does not go to the extent of mulcting, indirectly, consumers to compensate for services gratuitously performed in taking care of injured persons. It is confined to the reasonable expense incurred by or on behalf of the employer in providing the specific elements of relief mentioned in subdivision 1, § 2394—9 of the statute; giving to the words "reasonable expense incurred" their fair meaning, in the light of the system the legislature created. "Reasonable expense incurred" should be viewed from the standpoint of the injured person, where reasonably necessary, being, by law, the agent of the employer to act in their mutual interests in incurring the expense,—the possessor, so to speak, of a power in trust and in duty bound to act fairly for both parties. The more clearly it is appreciated that the basic logic of the law is mutuality of interest between employers, employees, and the public, and that each actor is charged with the duty of promoting the mutual interests, the more apparent the high ideal the legislature had in mind in creating the new system, and the greater the prospect of such ideal being realized. Nothing short of reasonable expenditure of money, or incurring of legal liability to expend money for the purposes contemplated in the act, can be held to satisfy the legislative conception of "reasonable expense incurred," as the words were used in the act. The services of a nurse in this case obviously do not fall within such meaning.

The result of the foregoing is that the judgment appealed from must be modified by deducting the charges for nurse and for medical and surgical treatment, leaving the sum of \$177.50, and as so modified, be affirmed.

So ordered.

Siebeck and Timlin, J.J., took no part.



**NEW HAMPSHIRE SUPREME  
COURT.**

MARL BOODY, Admr., Etc., of Erastus S.  
Boody, Deceased,  
v.

K. & C. MANUFACTURING COMPANY.

(77 N. H. 208, 90 Atl. 860.)

**Master and servant — workmen's compensation — work on milldams.**

1. Cleaning debris from the rack protecting the flume leading from a milldam is within the operation of an act providing compensation for one injured by work in any shop, mill, factory or other place in connection with any machinery propelled by steam or other mechanical power.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — injury not in connection with machinery.**

2. Liability under workmen's compensation act for injuries received in work in any shop, mill, factory, or other place in connection with, or in proximity to, any machinery propelled or operated by steam or other mechanical power, is not limited to injuries received in proximity to the machinery, but will include injuries by falling from the milldam, where the provision with respect to explosives limits the liability to injuries occasioned by explosion.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — workmen's compensation act — drowning — injury in course of employment.**

3. The accidental drowning of an employee, or his fall onto the rocks in the river bed, while engaged in the duty of clearing debris from the rack protecting the flume which carries the water from the dam to the mill in which he is employed, is within the operation of a statute providing compensation for injuries by accident arising out of or in the course of the employment.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — negligence in attempting work.**

4. An employee is not negligent as matter of law in going onto a wet and slippery walk to clear the debris from the rack protecting the flume leading water from the dam to the mill in which he is employed, where the work was necessary, and all fair-minded men would not agree that the risk of injury was so apparent that the ordinary man would not have encountered it.

*For other cases, see Master and Servant, II. c, in Dig. 1-52 N. S.*

(April 7, 1914.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Merrimack Coun-

**Note.** — For annotation on the workmen's compensation acts, see post, 23.  
L.R.A.1916A.

ty, made during the trial of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible under the employers' liability and workmen's compensation act, which resulted in a verdict in plaintiff's favor. Overruled.

Deceased was required, among other things, to clean the racks constructed to catch rubbish coming down the race to defendant's mill. On the morning of the accident he was seen standing on a walk with his back to the stream, attempting to pull rubbish out of a rack. Later his body was recovered from the river below the mill and a broken rake was found in the flume and a freshly broken rake handle was found in the river.

Further facts appear in the opinion.

Messrs. Jones, Warren, Wilson, & Manning, for defendant:

If the intestate was engaged in work outside the scope of his employment, recovery is barred.

Parent v. Nashua Mfg. Co. 70 N. H. 199, 47 Atl. 261.

Defendant's negligence is not shown to have caused the injury.

Dame v. Laconia Car Co. Works, 71 N. H. 407, 52 Atl. 864, 12 Am. Neg. Rep. 520; Deschenes v. Concord & M. R. Co. 69 N. H. 285, 46 Atl. 467; Reynolds v. Burgess Sulphite Fibre Co. 73 N. H. 126, 59 Atl. 615; Boucher v. Larochelle, 74 N. H. 433, 15 L.R.A.(N.S.) 416, 68 Atl. 870.

Messrs. Martin & Howe, for plaintiff:

Deceased was a workman within the meaning of the statute, and the evidence warranted the jury in finding that his death was caused by defendant's negligence.

Hamel v. Newmarket Mfg. Co. 73 N. H. 386, 62 Atl. 592; Charrier v. Boston & M. R. Co. 75 N. H. 59, 70 Atl. 1078; Cate v. Boston & M. R. Co. 77 N. H. 70, 87 Atl. 255; Boucher v. Larochelle, 74 N. H. 433, 15 L.R.A.(N.S.) 416, 68 Atl. 870; Crawford v. Maine C. R. Co. 76 N. H. 29, 78 Atl. 1078; Lockwood v. American Exp. Co. 76 N. H. 530, 85 Atl. 783; Godsoe v. Dodge Clothespin Co. 75 N. H. 67, 70 Atl. 1073; Bennett v. Concord Woodworking Co. 74 N. H. 400, 68 Atl. 460; Buell v. Berlin Mills Co. 77 N. H. 55, 86 Atl. 256; Bennett v. Warren, 70 N. H. 564, 49 Atl. 105.

It was competent for the jury to find that the defendant should "have reasonably anticipated the plaintiff's act."

Godsoe v. Dodge Clothespin Co. 75 N. H. 67, 70 Atl. 1073.

A "mill" does not mean merely the building in which the business is carried on, but includes the site, dam, and other things annexed to the freehold, necessary for its beneficial enjoyment.

5 Words & Phrases, 4507; Whitney v. Olney, 3 Mason, 280, Fed. Cas. No. 17,595; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19; Luttrell's Case, 4 Coke, 86a, 10 Eng. Rul. Cas. 294; Wilcoxon v. McGhee, 12 Ill. 381, 54 Am. Dec. 409; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Wind River Lumber Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co. 116 C. C. A. 160, 196 Fed. 340; Southern Bell Teleph. & Teleg. Co. v. D'Alemberte, 39 Fla. 25; 21 So. 570; Geloneck v. Dean Steam Pump Co. 165 Mass. 202, 43 N. E. 85.

The statute is constitutional.

State v. Roberts, 74 N. H. 478, 16 L.R.A. (N.S.) 1115, 69 Atl. 722; State v. Aldrich, 70 N. H. 391, 85 Am. St. Rep. 631, 47 Atl. 602; Cooley, Const. Lim. 6th ed. 479-481; State v. Griffin, 69 N. H. 34, 41 L.R.A. 177, 76 Am. St. Rep. 139, 39 So. 260; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 51 54, 56 L. ed. 327, 346, 347, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; Doherty, Liability of Railroads to Interstate Employees, 222; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The statutes are drawn with a solicitude to cover every species of property or appliance in respect to which a servant is required to do labor.

Thomp. Neg. 2d ed. § 4559; Kelley v. Great Northern R. Co. 152 Fed. 211; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; Merritt v. American Woolen Co. 71 N. H. 493, 53 Atl. 303; English v. Amidon, 72 N. H. 301, 56 Atl. 548, 15 Am. Neg. Rep. 391; Hamel v. Newmarket Mfg. Co. 73 N. H. 386, 62 Atl. 592; Cate v. Boston & M. R. Co. 77 N. H. 70, 87 Atl. 255; Charrier v. Boston & M. R. Co. 75 N. H. 59, 70 Atl. 1078; Bennett v. Warren, 70 N. H. 564, 49 Atl. 105; Godsoe v. Dodge Clothespin Co. 75 N. H. 67, 70 Atl. 1073; Young v. American Exp. Co. 76 N. H. 582, 86 Atl. 138; Zabriskie v. Erie R. Co. 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Muzik v. Erie R. Co. 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732; Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, post, 366, 142 N. W. 271, Ann. Cas. 1915B, 847; 2 Labatt, Mast. & S. §§ 639, 663. L.R.A.1916A.

When there is evidence that the accident was caused by the defendant's negligence, there may be a recovery.

Boucher v. Larochele, 74 N. H. 433, 16 L.R.A. (N.S.) 416, 68 Atl. 870; Lockwood v. American Exp. Co. 76 N. H. 530, 85 Atl. 783; Godsoe v. Dodge Clothespin Co. 75 N. H. 67, 70 Atl. 1073; Bennett v. Concord Woodworking Co. 74 N. H. 400, 68 Atl. 460; Cate v. Boston & M. R. Co. 77 N. H. 70, 87 Atl. 255; Buell v. Berlin Mills Co. 77 N. H. 55, 86 Atl. 256.

Young, J., delivered the opinion of the court:

By the enactment of chapter 163, Laws of 1911, the legislature intended to change the common law so that one who is injured by accident while engaged in work in which the risks are great and difficult to avoid may be compensated, in part, at least, for the loss thereby sustained, if the accident is one arising out of and in the course of the employment, regardless of the cause of his injury. Section 2. It seems to have been understood, however, that this change could not be made without the assent of all those affected by it. It was necessary, therefore, from that view point, to secure the assent of those affected by the act as well as to provide for compensation to the injured. It is the office of § 1 to define those who come within the operation of the act, and of §§ 2, 3, and 4 to induce them to accept its provisions. The means devised to induce such acceptance by employers were: (1) To provide that, if an employee is injured by accident arising out of and in the course of the employment, caused in whole or in part by the negligence of his employers or of their servants or agents, the employers shall be liable to the employee for all the loss he sustains, and he "shall not be held to have assumed the risk" of his injury; but there shall "be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed" (§ 2); and then (2) to relieve employers who accept the act in accordance with the provisions of § 3 from the burdens imposed on them in § 2. In other words, the means the legislature devised to induce employers to accept the provisions of the act was to take from those who do not accept it about the only real defense to an action by a servant which is open to his employer at common law.

Since the defendants have not complied with the provisions of § 3, the question of law raised by their first exception is whether it can be found: (1) That the intestate was engaged in one of the employments described in § 1; (2) that he was injured by



accident arising out of and in the course of the employment; (3) that their fault contributed to cause his injury; and (4) that he was free from fault.

1. One of the employments described in § 1 is "work in any shop, mill, factory or other place on, in connection with, or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power, in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor." The word "mill" may be used as meaning a building in which manufacturing is carried on. It is, however, often used as meaning a manufacturing establishment, and when used in this sense it includes all that is usually intended by the plant of a manufacturing concern; that is, it includes not only the buildings in which the work is done, but every appurtenant to them. The description of an accident that will entitle an employee to the benefits of the act as one caused by any defect in the employer's "plant" (§ 2) tends to the conclusion that that is the sense in which the word "mill" is used in § 1, and so does the context, for "employment" (b) is described as "work in any shop, mill, factory, or other place," not other building, as it probably would be if the words "mill, shop, and factory" were used in that sense. As there is nothing to rebut this presumption, it must be held that "mill," as used in § 1, includes not only the building in which the defendants' business is carried on, but their dam, flume, yard, and the ways they provide for the use of their employees. 27 Cyc. 511, II B; 20 Am. & Eng. Enc. Law, 674, note, "Common Usage;" Webster, New Int. Dict. "Mill;" 6 Century Dict. "Mill." The intestate, therefore, was engaged in employment (b), and the plaintiff is within the operation of the act unless, as the defendants contend, the employee's injury must be caused by a particular risk peculiar to the employment in which he is engaged in order to bring him within the provisions of the act.

It will be necessary, therefore, to consider what the legislature intended when it enacted: "This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section." Section 1.

The section describes five separate employments, (a), (b), (c), (d), and (e), and there are certain risks peculiar to each which probably induced the legislature to include those exposed to them within the operation of the act, for the dangers incident to these risks are great and difficult to avoid. Since this is so, the defendants say it follows that a person engaged in one

of those employments is not entitled to relief unless his injury results from the particular risk which induced the legislature to include those engaged in these employments within the operation of the act. To be more specific: They say that a person who is injured while at "work in any shop, mill, factory, or other place" is not entitled to the benefits of the act, notwithstanding he is injured by accident arising out of and in the course of his employment, unless his injury is caused either by the negligence of a fellow servant, or by one of the risks incident to work "on, in connection with, or in proximity to" power-driven machinery; that is, unless his injury is caused by one of the risks which induced the legislature to include those engaged in employment (b) within the operation of the act. They say that "not every employee in a given business or establishment covered by the act is within its protection but only those workmen . . . who are endangered" by the dangerous agencies described in the act, "while in the scope of their employment." Is this contention sound?

It will be helpful, when considering the question, to remember that it is the office of § 1 to limit the workmen who come within the operation of the act, and of § 2 to describe an accident that will entitle such workmen to its benefits. In the final analysis, the defendants' contention is that the words "workmen engaged in . . . work in any shop, mill, factory, or other place, on, in connection with, or in proximity to," power-driven machinery, are descriptive of an accident, not an employment, which will bring a workman within the operation of the act, or that those words were intended to limit the accidents that will entitle those engaged in such work to the benefits of the act. The act, however, says that it applies "to workmen engaged in manual or mechanical labor in the employments described in this section," not to those who are injured while engaged in any one of those employments by the particular risk which induced the legislature to include those engaged in it within the operation of the act; and there would be more force in the defendants' contention if it were not for the fact that the description of employment (d), all work necessitating dangerous proximity to steam boilers and explosives, concludes: "Provided injury is occasioned by the explosion of any such boiler or explosive." The fact that the legislature expressed an intention to limit the operation of the act, in so far as persons engaged in the employment are concerned, to those who are injured as a result of the particular risk it had in mind when it described the employment, nega-

tives an implied intention to limit the operation of the act in the same way in so far as those engaged in the other four employments are concerned. In other words, it is probable that if the legislature had intended to limit the benefits of the act, in so far as these four employments are concerned, to those who are injured by the particular risk that induced it to include them within the operation of the act, it either would have omitted this proviso from the description of (d), or included similar provisos in the descriptions of (a), (b), (c), and (e). The fact that the legislature added this proviso to the description of one and omitted similar provisos from the description of the other employments, when taken in connection with the fact that the declared purpose of § 1 is to limit the workmen to whom the act applies, and of § 2, to describe the accidents which will entitle them to its benefits, makes it certain that those who are injured in an accident described in § 2, while engaged in employments (a), (b), (c), and (e), are entitled to the benefits of the act, both when their injuries are and when they are not caused by the particular risk which induced the legislature to include those engaged in their employments within the operation of the act. In short, there is nothing in the act to show an intention to confine its benefits, in so far as those engaged in employment (b) are concerned, to employees who are injured either by the negligence of a fellow servant or by coming in contact with power-driven machinery. A somewhat similar provision of the English workmen's compensation act of 1897 (60-61 Vict. chap. 37) is construed in the same way. *Maude v. Brook* [1900] 1 Q. B. 575, 69 L. J. Q. B. N. S. 322, 64 J. P. 181, 48 Week. Rep. 290, 82 L. T. N. S. 39, 16 Times L. R. 164.

Any person, therefore, who is engaged in manual or mechanical labor in any shop, mill, factory, or other place, by whatever name known, in which shop, mill, factory, or place power-driven machinery is used and five or more persons are employed, is engaged in employment (b) and is entitled to the benefits of the act if he is injured "by accident arising out of and in the course of the employment."

2. This brings us to the question whether it can be found that the intestate lost his life in such an accident. The words "by accident arising out of and in the course of the employment" are found in many (perhaps in most) employers' liability and workmen's compensation acts. As these acts are construed, any untoward and unexpected event is an accident. *Fenton v. Thorley* [1903] A. C. 443, 72 L. J. Q. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. L.R.A.1916A.

314, 19 Times L. R. 684. That is, "accident" is used in its popular sense. Since this is so, the intestate met his death by accident, unless he jumped into the river to kill himself. It can be found, therefore, that his death was accidental. The next question to be considered is whether the accident was one arising out of and in the course of his employment. The accident arose out of the intestate's employment, within the meaning of all the cases; but, while there is nothing that can be called a consensus of opinion as to what constitutes an accident (*Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458; *Parker v. Hambrook*, 107 L. T. N. S. 249, [1912] W. N. 205, 56 Sol. Jo. 750, 5 B. W. C. C. 608, Ann. Cas. 1913C, 1; *Fitzgerald v. Clarke* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101) most of the cases that have been decided since 1902 would have been decided as they were, if the test that is applied to determine whether an employee was acting within the scope of his employment when he was injured had been applied to determine whether the employee was injured by accident arising in the course of the employment. For a review of the authorities on this question, see an article by Professor Bohlen in 25 *Harvard Law Review*, 328, and note in Ann. Cas. 1913C, 4-21. Therefore the method which should be employed in this case to determine whether the intestate was injured by accident arising in the course of the employment is to inquire whether it can be found (1) that he was cleaning the rack at the intake when the accident happened; and, if it can be, (2) whether he thought the defendants expected him to clean it that morning.

It is true that no one saw the accident, but the intestate was seen at or about the time it happened, and at that time was standing on the walk very near to the river, with his back toward the stream, trying to pull some bushes out of the rack with an ordinary garden rake. As no one saw just what happened, it is fair to ask what would have been likely to happen if the rake handle broke or the bushes gave way suddenly. It is clear that, if either of those things happened, he might lose his balance and strike his head on the rocks in the river. The marks that were found on his body tend to the conclusion that that was just what did happen. It can be found, therefore, from the evidence as to where he was standing about the time the accident happened, his position with reference to the river, and the work he was doing at that time, taken in connection with the evidence as to the rocks in the river and the marks found on his body, either



that the rake handle broke, or that the bushes on which he was pulling gave way suddenly, and that he lost his balance and in falling struck his head on the rocks and was killed. In other words, it can be found that he was cleaning the rack at the intake when the accident happened.

Can it be found that he supposed the defendants expected him to clean that rack that morning? His foreman testified that it was the intestate's duty to clean the rack when it needed cleaning, but said he told him not to clean it that morning, but to clean the rack at the wheels and then report for work. There was evidence, however, to warrant a finding that no such instructions were given. It can be found that both racks needed cleaning and that it was reasonable for the intestate to think he was expected to clean them. Consequently it can be found that he was doing what he was employed to do, and doing it in the way he was expected to do it, when the accident happened. In other words, it can be found that he was killed "by accident arising . . . in the course of the employment." *De Fazio v. Goldschmidt Detinning Co.* — N. J. L. —, 88 Atl. 705, 4 N. C. C. A. 716; *Zabriskie v. Erie R. Co.* 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778.

3. It can be found that the defendants were in fault for not railing the walk, and that, if it had been properly railed, the accident would not have happened; in other words, that, but for their fault, the accident would not have happened.

4. Can it be found that the intestate was free from fault? The defendants contend that he was negligent in undertaking

to clean the racks that morning. The test by which to decide that question is the answer to the inquiry whether the ordinary man, with his knowledge of the situation and its dangers, would have undertaken the work. Although the intestate knew the walk was wet and slippery, as well as unrailed, and that if he lost his balance he might fall into the river, it cannot be said that all fair-minded men must agree that the risk incident to doing the work that morning, because of the condition of the walk or the character of the instrumentalities the defendants provided, was so great or the danger so apparent that the ordinary man, with his knowledge of the situation and its dangers, would not have encountered it. Consequently it cannot be said, as matter of law, that he was in fault for encountering it.

There is no merit in the defendants' contention that the instructions excepted to were calculated to give the jury the impression that the statute permitted a recovery, even though the accident would not have happened but for the intestate's negligence. It is enough to say that no such inference can be drawn from the charge. In fact, the jury were told in so many words that the plaintiff could not recover unless they found "from the evidence" that the intestate's carelessness did not contribute to cause his death.

Exceptions overruled.

**Plummer, J.**, did not sit; the others concurred.

Petition for rehearing denied.

## WISCONSIN SUPREME COURT.

EDWARD A. KILL, Appt.,  
v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Respts.

(160 Wis. 549, 152 N. W. 148.)

### Master and servant — workmen's compensation act — aggravation of injury.

The aggravation by a boxing match of a wound received in the course of employment which had practically healed and would have caused no further trouble had it been given a little more rest, so that blood poisoning and permanent injury to a hand result, is the proximate cause of such injury, and no recovery can be had under a workmen's compensation act providing compensa-

tion for injuries received in the course of employment.

*For other cases, see Proximate Cause, V. in Dig. 1-52 N. S.*

(April 13, 1915.)

**A**PPEAL by plaintiff from an order of the Circuit Court for Dane County confirming an order of the Industrial Commission dismissing his application for compensation, under the workmen's compensation act, from the defendant packing company for injuries received in the course of his employment. Affirmed.

Statement by **Kerwin, J.**:

The appeal is from a judgment confirming an order of the Industrial Commission dismissing the application of the appellant for compensation from the respondent Plankinton Packing Company.

The appellant was employed as a tinsmith

**Note.** — For annotation on the workmen's compensation acts, see post, 23.  
L.R.A.1916A.

by the packing company in its plant. On April 16, 1913, he accidentally cut his left wrist. The respondent packing company sent him to a physician, who treated him. On April 25, 1913, the wound was practically healed, and the physician discharged him as cured. Saturday evening, April 26th, the appellant engaged in a boxing match, and on the following Monday night suffered pain in his wrist. On the following day his wrist was found to be infected, and finally he lost bones of the hand and wrist, incapacitating him from following his trade.

The Commission found as follows: "From the evidence before us we are fairly satisfied that the wrist became infected at the time of the injury on April 16th, through the introduction of poisonous bacteria known as streptococci. Through nature's process these germs were walled off and did no damage at first. This was because the patient was strong enough to resist the attack of the bacteria. Had he not entered the boxing bout, we are satisfied that in the course of time the bacteria would have been expelled from the system without harmful results. But the strenuous exercise of the boxing bout had the effect of 'lighting up' or stirring into activity the poisonous germs, and at the same time lessening the resisting power of the applicant, resulting in the active poisoning of the arm. Before entering the bout, on the 25th of April, at the time of his discharge by the doctor, the applicant was advised not to enter the bout. The doctor told him it might do harm, and it might not,—it would be impossible to say,—but advised him not to enter it, and explained to him the danger of a possible tearing or bruising. Before entering the bout the applicant bandaged his wrist and provided against tearing or bruising, and no tearing or bruising resulted from the bout. We cannot say from the evidence that applicant wilfully disregarded the advice of his physician, because we cannot find that the physician gave him positive instructions not to enter the bout, but merely advised him that there was danger of harm from tearing or bruising. He certainly did not point out to the applicant the danger of the results that actually did follow from the exercise. Applicant was not warned of the danger of blood poisoning from the 'lighting up' of the present infection. Evidently he did not know that his arm was infected, or that such infection might become dangerous from strenuous exercise. For this reason we cannot say that the applicant wilfully disregarded the advice of the physician. Had the applicant not been injured on the 16th of April while in the employ of the respondent, the loss of the use of his hand would not have followed the boxing bout. L.R.A.1916A.

Notwithstanding such accident, had applicant refrained from entering the boxing bout and given his wrist only moderate exercise for a few days more, no serious results would have followed."

Upon the foregoing findings the Commission dismissed the application. The appellant assigns the following errors:

(1) That the finding that, "had he not entered the boxing bout, we are satisfied that in the course of time the bacteria would have been expelled from the system without harmful results," is not supported by the evidence.

(2) That the finding that, "notwithstanding such accident, had applicant refrained from entering the boxing bout and given his wrist only moderate exercise for a few days more, no serious results would have followed," is not supported by the evidence.

(3) That the findings of fact do not support the order made by the Commission.

Messrs. Henry V. Kane and J. W. Flynn, for appellant:

If the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation.

Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247; Matwitz v. Pfister & V. Leather Co. Workmen's Compensation 2d Annual Report, p. 73; Burns's Case, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; Newcomb v. Albertson, 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783; Brown v. Kent [1913] 3 K. B. 624, 82 L. J. K. B. N. S. 1039, 109 L. T. N. S. 293, 29 Times L. R. 702, 6 B. W. C. C. 745; Ystradowen Colliery Co. v. Griffiths [1909] 2 K. B. 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622.

While the original accident was the proximate cause of plaintiff's disability within the meaning of the compensation act, the lighting up of the present germs by the exercise of the bout was not an intervening agency.

Batton v. Public Service Corp. 75 N. J. L. 857, 18 L.R.A. 640, 127 Am. St. Rep. 855, 69 Atl. 164; Hope v. Troy & L. R. Co. 40 Hun, 438, 5 Am. Neg. Cas. 430, affirmed in 110 N. Y. 643, 17 N. E. 873; Wieting v. Millston, 77 Wis. 523, 46 N. W. 879; Salladay v. Dodgeville, 85 Wis. 318, 20 L.R.A. 541, 55 N. W. 696.

Messrs. W. C. Owen, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for respondent Commission:

The inquiry whether the injury to plaintiff, that is the loss of the use of his hand, was proximately caused by the accident, is



a question of fact to be decided by the Commission.

*Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; *Gould v. Merrill R. & Lighting Co.* 139 Wis. 433, 121 N. W. 161; *Fuhrmann v. Coddington Engineering Co.* 156 Wis. 650, 146 N. W. 796; *Ward v. Ætna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70; *Hales v. Michigan C. R. Co.* 118 C. C. A. 627, 200 Fed. 533; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Proulx v. Bay City*, 143 Mich. 550, 107 N. W. 273; *Dunnigan v. Caven & Lind* [1911] S. C. 579, 4 B. W. C. C. 386, 48 Scot. L. R. 459; *Smith v. Cord Taton Colliery Co.* 2 W. C. C. 121.

The boxing bout, and not the accident, was the proximate cause of the injury.

*Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 8 N. W. 862; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19, 52 N. W. 1129; *Chicago, B. & Q. R. Co. v. Richardson*, 121 C. C. A. 144, 202 Fed. 836; *Peck, Proximate Cause*, § 58, ¶ 322; *Seith v. Commonwealth Electric Co.* 241 Ill. 252, 24 L.R.A.(N.S.) 978, 132 Am. St. Rep. 204, 89 N. E. 425; *Beckham v. Seaboard Air Line R. Co.* 127 Ga. 550, 12 L.R.A.(N.S.) 476, 56 S. E. 638; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 52, 19 L. ed. 65, 67; *The Santa Rita (Societe Nouvelle D'Armement v. United States S. S. Co.)* 30 L.R.A.(N.S.) 1210, 100 C. C. A. 360, 176 Fed. 890; *Atchison T. & S. F. R. Co. v. Calhoun*, 213 U. S. 1, 7, 53 L. ed. 671, 674, 29 Sup. Ct. Rep. 321; *Jennings v. Davis*, 109 C. C. A. 451, 187 Fed. 703; *Hartford Steam Boiler & Inspection Co. v. Pabst Brewing Co.* 120 C. C. A. 54, 201 Fed. 617, Ann. Cas. 1915A, 637; *Lewis v. London* [1914] W. C. & Ins. Rep. 299, 7 B. W. C. C. 577, 58 Sol. Jo. 686; *Noden v. Galloways* [1912] 1 K. B. 46, 5 B. W. C. C. 7, [1911] W. N. 192, 81 L. J. K. B. N. S. 28, 105 L. T. N. S. 567, 28 Times L. R. 5, 55 Sol. Jo. 838; *Cameron v. London*, 5 B. W. C. C. 416; *Ward v. Ætna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70; *Smith v. Cord Taton Colliery Co.* 2 W. C. C. 121; *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256; *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; *Dawbarn, Employers' Liability*, 106; *Humber Towing Co. v. Barclay*, 5 B. W. C. C. 142; *Della Rocca v. Stanley Jones & Co.* [1914] W. C. & Ins. Rep. 33, 7 B. W. C. C. 101; *David v. Windsor Steam Coal Co.* 4 B. W. C. C. 177; *Upper Forest & W. Steel & Tinplate Co. v. Grey*, 3 B. W. C. C. 424; *Simpson v. Byrne*, 47 Ir. Law Times, 27, 6 B. W. C. C. 45; *Harrison L.R.A.*1916A.

*v. Barkley*, 1 Strobh. L. 525, 47 Am. Dec. 578.

*Mr. J. A. Fish* also for respondent Commission.

*Messrs. Quarles, Spence, & Quarles* for other respondents.

*Kerwin, J.*, delivered the opinion of the court:

The contention of the appellant is that his present disabled condition is the proximate result, within the meaning of § 2394—3, Stat., of the injury received by him while in the course of his employment by the defendant Plankinton Packing Company, respondent. While, on the other hand, it is insisted that plaintiff recovered from the injuries sustained while in its employ, and that the infection which developed subsequent to the boxing bout came as a proximate result of that bout.

The claim of appellant is that the Commission acted, in making the order of dismissal, in excess of its powers, and that its findings of fact do not support the order. It is said that the findings of the Commission are susceptible of only one legal inference, namely, that the accident of April 16, 1915, suffered by plaintiff, proximately caused his disability, within the meaning of the compensation act, and that the order of dismissal is based upon an erroneous conclusion drawn from the facts found.

Counsel for appellant seems to rely upon *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247, as giving support to their contention. True, in that case this court held that the right of recovery under the workmen's compensation act is not dependent upon a question of negligence or upon the concomitant conception of negligence at common law, and that the element of anticipation characteristic in common-law negligence cases does not obtain under the workmen's compensation act, so that the element of reasonable anticipation is eliminated from proximate cause under the act, and the proximate cause mentioned in the workmen's compensation act means caused, in a physical sense, by a chain of causation which, as to time, place, and effect, is so closely related to the accident that the injury can be said to be caused thereby. The case is not out of harmony with the ruling of the Commission and the court below in the instant case.

The contention of the learned counsel for appellant is that since the original injury left some trace of its effect, which but for the violent exercise of the bout would have been cured, still the proximate cause must be regarded the original injury. It seems clear from the findings supported by evidence, that the injury to the appellant

while in the employ of the packing company was not the proximate cause of the present disability. That injury had been healed and cured, sufficient at least that, had it not been for the bout voluntarily entered into with knowledge of the danger, the injuries complained of would not have occurred. The Commission, therefore, was justified in finding that the bout proximately caused the injury complained of. *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 8 N. W. 862. The injury must be proximately caused by the accident, and not self-inflicted. Stat. § 2394—3.

In the instant case the bout, which was subsequent to the original injury, intervened and was the efficient cause, and had its origin independent of the original cause and superseded it, and thereby became the proximate

cause of the injury. *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19, 52 N. W. 1129.

As appears from the statement of facts, the Commission found that, had the applicant refrained from entering the boxing bout and given his wrist only moderate exercise for a few days more, no serious result would have followed. This finding is supported by the evidence, and establishes the fact that the boxing bout proximately caused the injury complained of, within the meaning of the workmen's compensation act; therefore the decision below is right and must be affirmed.

Timlin, J., took no part.

## MICHIGAN SUPREME COURT.

MARY SPOONER

v.

DETROIT SATURDAY NIGHT COMPANY, Plff. in Certiorari.

(— Mich. —, 153 N. W. 657.)

### Courts — reviewing finding of Industrial Accident Board.

1. The court will not review or weigh the evidence upon which a finding of the Industrial Accident Board is founded, if there is in fact evidence to support the finding.

*For other cases, see Courts, I. c, 1, in Dig. 1-52 N. S.*

### Master and servant — workmen's compensation act — injury not arising out of employment.

2. An injury to an engineer employed to run the engine and dynamo in the basement of a printing plant, while he is attempting to operate the elevator for the accommodation of employees of the plant on the upper floors of the building, without the knowledge or request of his employer, and at a time when he did not need such service, does not arise out of or in the course of his employment, within the meaning of the workmen's compensation act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(July 23, 1915.)

**C**ERTIORARI to the Industrial Accident Board to review its decision affirming an award of the Committee of Arbitration in favor of claimant in a proceeding for compensation under the workmen's compensa-

**Note**—As to application and effect of workmen's compensation acts generally, see annotation, post, 23.  
L.R.A.1916A.

tion act, for the death of her husband. Reversed.

The facts are stated in the opinion.

Mr. William L. Carpenter, with Messrs. McGregor & Bloomer, for plaintiff in certiorari:

Spooner was not an employee of the defendant company as a matter of law.

A contract cannot be implied from the mere fact that services are rendered.

*Woods v. Ayres*, 39 Mich. 350, 33 Am. Rep. 396; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243, 11 Mor. Min. Rep. 562; *Eaton v. Gay*, 44 Mich. 431, 38 Am. Rep. 276, 6 N. W. 862; *Covel v. Turner*, 74 Mich. 408, 41 N. W. 1091; *Notley v. First State Bank*, 154 Mich. 681, 118 N. W. 486; *Re Haan*, 169 Mich. 146, 134 N. W. 983; *Heral v. McCabe*, 171 Mich. 530, 137 N. W. 237.

The injuries did not arise out of and in the course of employment.

*Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64; *Lowe v. Pearson* [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124; *Reed v. Great Western R. Co.* 2 B. W. C. C. 109, 99 L. T. N. S. 781, [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 25 Times L. R. 36, 46 Scot. L. R. 700, 53 Sol. Jo. 31; *Furniss v. Gartside & Co.* 3 B. W. C. C. 411; *Cole v. Evans, Son, Lescher & Webb*, 4 B. W. C. C. 138; *Brice v. Edward Lloyd*, 2 B. W. C. C. 26 [1909] 2 K. B. 804, 25 Times L. R. 759, 127 L. T. Jo. 322, 101 L. T. N. S. 472, 53 Sol. Jo. 744; *Millers v. North British Locomotive Co.* 2 B. W. C. C. 80, 46 Scot. L. R. 755 [1909] S. C. 698; *Weighill v. South Heaton Coal Co.* 4 B. W. C. C. 141 [1911] 2 K. B. 757, note; *Jenkinson v. Harrison, A. & Co.* 4 B. W. C. C. 194; *Cronin*



v. Silver, 4 B. W. C. C. 221; Naylor v. Musgrave Spinning Co. 4 B. W. C. C. 286.

Messrs. **Beaumont, Smith, & Harris**, for defendant in certiorari:

The findings of fact by the Industrial Accident Board, to the effect that Spooner was an employee of defendant and that the accident arose out of and in the course of his employment, are conclusive.

Rayner v. Sligh Furniture Co. 180 Mich. 168, post, 22, 146 N. W. 665, 4 N. C. C. A. 851; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516, Ann. Cas. 1915A, 737; Diaz's Case, 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609; Donovan's Case, 217 Mass. 76, 104 N. E. 431, 4 N. C. C. A. 549, Ann. Cas. 1915C, 778; Bentley's Case, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; Herriek's Case, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554.

Spooner was an employee of the defendant within the meaning of the statute.

40 Cyc. 2808; Painter v. Ritchey, 43 Mo. App. 111; Rayner v. Sligh Furniture Co. 180 Mich. 168, post, 22, 146 N. W. 665, 4 N. C. C. A. 851; Wolfe v. Mosler Safe Co. 139 App. Div. 848, 124 N. Y. Supp. 541; Roe v. Winston, 86 Minn. 77, 90 N. W. 122, 14 Am. Neg. Rep. 685; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500, 4 Am. Neg. Rep. 320; Rozelle v. Rose, 3 App. Div. 132, 39 N. Y. Supp. 363; 2 Labatt, Mast. & S. ¶ 535.

Spooner operated the elevator as a part of his general employment incidental to his work as engineer of the plant, and his injuries arose out of and in the course of it.

Broderick v. Detroit Union R. Station & Depot Co. 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 802; Miner v. Franklin County Teleph. Co. 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653; M'Quibban v. Menzies, 37 Scot. L. R. 526, (1900) 2 F. 732, 7 Scot. L. T. 432; Ruegg, Employers' Liability & Workmen's Compensation, p. 346.

**Stone, J.**, delivered the opinion of the court:

This is a claim made by Mary Spooner, widow of James Spooner, against the Detroit Saturday Night Company, for compensation for the death of her husband, under act No. 10, Public Acts of 1912, known as the workmen's compensation act. The Detroit Saturday Night Company, having previously suffered a fire in its plant in the city of Detroit, on Monday, February 3, 1913, entered into a contract with the Winn & Hammond Company, through T. H. Collins, its receiver, as follows:

Detroit, Mich., Monday, February 3, 1913.

Agreement between T. H. Collins, receiver L.R.A.1916A.

for Winn & Hammond Company and the Detroit Saturday Night Company, city of Detroit, state of Michigan and county of Wayne, on the 3d day of February, 1913.

I agree for such a period as the said Winn & Hammond Company shall be under my control, and until such time as twenty-four hours' notice shall be given to the Detroit Saturday Night Company, to furnish the following equipment and power for same at the prices and under the conditions named in this instrument: Cylinder press at 75 cents per hour; Gordon press at 33½ cents per hour; power cutting machine at 50 cents per hour; stitching machine at 50 cents per hour; folding machine at 50 cents per hour; perforator at 50 cents per hour; the use of type, tones, and material necessary for composition work at \$3 per day.

I also agree to furnish elevator service, telephone service, and office service, which shall consist of providing cards and keeping time of such employees as the said Detroit Saturday Night Company may assign to this plant for operating machinery rented to them, at the rate of \$10 per week.

It is further understood and agreed between both parties that no type or other material shall be removed from the plant of the Winn & Hammond Company by the said Detroit Saturday Night Company.

It is further agreed that, should the Detroit Saturday Night Company wish to operate the machinery in this plant at any time other than the stated working hours of the Winn & Hammond Company, which are 7 A. M. to 11:30 A. M. and 12:15 P. M. to 5 P. M., that the charge for power service shall be \$1.00 per hour in addition to the prices above quoted, and that the Detroit Saturday Night Company agree to furnish a competent engineer to tend boiler and perform such other duties as usually fall to a man in that capacity.

It shall be optional with the Detroit Saturday Night Company how much of this machinery they shall operate, and they agree to give ample notice when any additional machinery shall be wanted or discontinued.

The said Detroit Saturday Night Company further agrees to abide by and perform any and all orders of the bankruptcy court concerning its occupancy and use of said property.

[Signed] H. H. Nimmo,  
Vice Pres., Detroit Saturday Night Co.

[Signed] Winn & Hammond Co.,  
Per T. H. Collins.

Approved: Lee E. Joslyn, Referee.

The Detroit Saturday Night Company, in accordance with the terms of the foregoing contract, employed an engineer by the

name of Leonard J. McCabe to operate the engine in said plant on the night of February 6, 1913, that being the first night that said company operated said plant. This engineer was employed on Wednesday, February 5th. He went to the plant of the Winn & Hammond Company on Wednesday, February 5th, to look over the plant preparatory to taking charge of it on the night of February 6th. On this occasion he told James Spooner, then in charge of the plant, that he was going to take charge of the same on Thursday night, February 6th. On Thursday, February 6th, at about 5 o'clock, McCabe went to the plant for the purpose of taking charge that night. He saw Spooner, and the latter objected and desired himself to operate the engine. McCabe testified that Spooner told him that they were going to run about 9 o'clock, and that he (Spooner) would run himself that night, and it was not necessary for McCabe to stay. McCabe then went away and Spooner did actually operate the engine in said plant on the night of February 6, 1913. James Spooner, husband of claimant, was a stationary engineer in the employ of the Winn & Hammond Company, and had been in its employ as such stationary engineer for a period of twenty years or more, prior to said February 6th. His duties were to run the engine and dynamo in the plant. It was not a part of his duties to run the elevator, but he sometimes did so for his own convenience, as did other employees, in the absence of the regular elevator man, or when requested by the employer in furthering its work. On the night in question, or about 2 o'clock in the morning of February 7th, said James Spooner left his place of duty in the engine room in the basement of said plant and went to the upper floors of said building. In going to said upper floors he walked up the stairway. Upon the second floor he met Otto Loeffelbein, John C. Hussey, and a Mr. Wheeler, employees of the Detroit Saturday Night Company, and stopped with them and had a casual conversation. Shortly after James Spooner came upon said second floor said Hussey and the others started to go up the stairway from the second to the third floor of said building for the purpose of getting some stools to sit upon at their work; and thereupon said James Spooner offered to take them up on the elevator, saying: "What's the use of your walking; ride up." And said Spooner did then and there open the door of the elevator which stood there, and the said employees got upon the same, and Spooner operated it in such a manner as to cause it to ascend. The elevator passed one floor in safety, and just as it was passing the next floor James Spooner received the injuries L.R.A.1916A.

which caused his death. There was no light whatever upon the elevator, and the men upon it were unable to tell the cause of the accident from which Spooner suffered the injuries which caused his death. The claimant made demand upon the appellant for payment to her of compensation because of the death of said James Spooner, under the terms of said act. The appellant denied all liability to said Mary Spooner under said act. An arbitration was had under the act, and the committee of arbitration awarded said Mary Spooner the sum of \$2,520. The appellant filed a claim of review of the decision of said committee with the Industrial Accident Board, and said decision of said committee was duly reviewed by said Industrial Accident Board, and on June 10, 1913, said Board made a decision affirming the decision of said arbitration committee. The case is here for review upon certiorari.

The appellant insists that it did not make any contract, express or implied, of employment with said James Spooner, and that in his operation of said engine on the night of February 6, 1913, he was acting as the employee of Winn & Hammond Company, and not as the employee of the Detroit Saturday Night. The Industrial Accident Board, in its fourth finding of fact, found as follows: "Mr. Spooner was engaged in operating the engine in the plant for Winn & Hammond Company, until 5 o'clock in the afternoon of February 6th, and from that hour until he met his death, at about 2 o'clock in the morning of February 7th, he was in the employ of the Detroit Saturday Night Company, being engaged that night in operating the plant as engineer in getting out its paper, and that Spooner at the time of the accident was in fact an employee of the Detroit Saturday Night."

It is the claim of appellant that there was no evidence whatever to support this finding of fact. The said Industrial Accident Board found, as matter of law, that the injury received by said James Spooner, and which caused his death, arose out of and in the course of his employment by the Detroit Saturday Night Company, and that said employment was not a casual employment within the meaning of said act, so as to debar Mary Spooner from recovering compensation for the death of James Spooner.

By appropriate assignments of error the following propositions are presented by the appellant:

(1) That Spooner was not an employee of the Detroit Saturday Night Company as matter of law.

(2) That the injuries did not arise out of and in the course of his employment.



(3) That if Spooner was an employee of the Detroit Saturday Night Company, his employment was a casual employment.

1. On the first proposition urged by appellant, a careful reading of the evidence contained in this record leads us to the conclusion that we cannot say that there was no evidence to support the finding that Spooner was an employee of the Detroit Saturday Night Company. Under the statute, as construed by this court, if there was evidence to support the finding, we will not review or weigh that evidence. *Rayner v. Sligh Furniture Co.* 180 Mich. 168, post, 22, 146 N. W. 665, 4 N. C. C. A. 851. We think there was some evidence in support of this finding.

2. Did the injuries arise out of and in the course of his employment? The appellant needed and had employed an engineer to operate the engine and dynamo upon the night in question. It was not concerned with and did not need the use of the elevator. As matter of fact, the agreement had provided that the Winn & Hammond Company was to furnish the elevator service, but no such service was needed by appellant that night. If we are right in saying, under the first proposition, that there was evidence that Spooner was in the employ of the appellant, that employment was solely to operate the engine and dynamo. The evidence is silent as to any other duty imposed upon him by the appellant. The engine room was located in the basement of the building; and, so far as this record shows, Spooner had no occasion to leave it, and had no duty to perform upon the upper floors of the building during the night of the injury. Under the evidence he had gone upon these upper floors purely and solely to visit with the men working there. The evidence is undisputed that he walked up the stairway. He owed no duty to those men, or to anybody, to take them to the upper floors upon the elevator; neither was he requested to do so. It was doubtless a friendly act upon his part, which did not tend to further the business of appellant. At the time of the injury we think that he was engaged in an act outside of, and not in the course of, his employment, and the injuries he received and which caused his death did not arise out of and in the course of his employment. The elevator shaft was in pitch darkness, by the undisputed evidence, and in using it he not only risked his own life, but that of the men he took upon the elevator with him. Had he remained in the place where his duties called him and attended to those duties, he would not have been injured, so far as this record shows. The material question is not what he had done at times, for his own

convenience or otherwise, while in the employ of Winn & Hammond Company, but the pertinent question is: What was he employed to do upon this night? Manifestly, to run and care for the engine and dynamo. This injury occurred while he was away from his work, and while he was a voluntary visitor to the employees of the appellant, and the act was for his own pleasure or satisfaction.

Counsel for appellee in support of their claim have called our attention to the case of *Miner v. Franklin County Teleph. Co.* 83 Vt. 311, 26 L.R.A. (N.S.) 1195, 75 Atl. 653. In that case the plaintiff was an employee of the defendant telephone company. On the day of the accident defendant's foreman said to the linemen, of which the plaintiff was one, that they would go down and splice the cable at a certain point, and all went together to the place. On arriving there the foreman told the plaintiff and another lineman to go to a certain place and get a ladder. They were unable to get it, and the plaintiff so reported to the foreman on their return. The foreman was then on the cable seat, with his materials at hand, and was just commencing the work of splicing. After watching him awhile, the plaintiff said he guessed he would go up and help him, and received no reply. The plaintiff then ascended the pole and stood on an upper cross-arm and handed the sleeves to the foreman as he needed them, the foreman taking them from him and using them as he proceeded with the splicing. After working in this manner for about twenty minutes, the foreman placed the bag containing the sleeves on the other side of him, which put them beyond the plaintiff's reach; and, after looking on awhile, the plaintiff said he would go down, and proceeded to do so, receiving therein the injury complained of. These were the circumstances tending to show that the plaintiff was in the performance of his duty when he received the injury. In deciding the case for the plaintiff the court said: "The voluntary offer of a willing servant to make himself useful in a matter not covered by any express command, when the proffered service is accepted by his superior, although not by an approval expressed in words, cannot be said, as matter of law, to put the servant outside the limits of his employment."

We think the case readily distinguishable from the instant case. In fact it might be said the plaintiff there was in the performance of and carrying on the very work for which he was employed, to wit: He was assisting his foreman, who undoubtedly represented the master. In this instant case Spooner was rendering no service which was either accepted by or known to his su-

perior, but was engaged in a voluntary, friendly act entirely outside the scope of his employment upon the night in question.

Our attention is also called by appellee to the case of *M'Quibban v. Menzies*, 37 Scot. L. R. page 526, (1900) 2 F. 732, 7 Scot. L. T. 432. In that case a workman was engaged as a laborer in a steam joinery, his duty being to carry wood from the machine men to the joiners and to clean and sweep up the floor of the machine room. A belt in connection with one of the machines became loose, and he went, without being asked so to do, to assist the machine man in replacing the belt upon the shaft. At the request of the machine man the workman ascended a ladder to try and replace the belt, and, his arm being caught in the belt, he was drawn up into the shaft and received fatal injuries. It was admitted that had a foreman been present he might have ordered the workman to do this act, but no other person had authority to order him to do so. Held, that the accident was one arising out of and in the course of his employment in the sense of the workmen's compensation act. The court said: "The question of law which we have to decide is whether the deceased workman was injured by an accident arising out of and in the course of his employment, and although that would appear primarily to be a question of fact, there is no doubt that in cases of this kind questions of fact and law sometimes run into one another. The words 'arising out of and in the course of the employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master beyond the scope of what he was employed to do. The act does not say, 'when doing the work which he was employed to perform' but it is a fair inference that if it had been intended to limit the right to compensation to such accidents, different language would have been used from that which occurs in the act. It must be assumed, therefore, that the legislature used language of wider scope to include cases where a workman intervenes to do something useful and helpful to his master, although outside the special duties which he is employed to perform."

After citing cases, the court concluded: "The action of the workman in this case appears to me to have been a natural and helpful intervention in the conduct of his master's business, and accordingly I am of the opinion that the question should be answered in the affirmative."

Here also it clearly appeared that the servant was doing something in the interest L.R.A.1916A.

of his master, or in the language of the opinion, "something useful and helpful to his master." Such was not the fact in the instant case, as we have already stated.

Our attention is also called to language used by Ruegg in his work on *Employers' Liability and Workmen's Compensation*, at page 346, where that author says: "The words 'arising out of the employment' may be satisfied if it is shown that the occupation in which the workman was engaged, though not strictly part of his duties, was being done in the mutual interest of the employer himself" (citing cases).

Here the same distinction is made which we have pointed out above. The case of *M'Quibban v. Menzies*, supra, has been referred to as an "Emergency Case." Such cases seem to be an exception to the general rule where a workman, for the protection of his master's interest, acts in an emergency. Manifestly, there was no emergency in the instant case.

We are of opinion that the cases cited by appellant are applicable to the instant case, although the contrary is claimed by appellee. *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64. In that case a ticket taker in the employ of the railway, after he had collected his tickets from a train, got upon the footboard of the train after it had started, to speak to a woman passenger, and was injured. It was held that the accident was not one arising out of and in the course of his employment. This case was disposed of upon the principle that where the workman is doing an act entirely for his own purposes, and in no way, either directly or indirectly, in the interest of his employer, then, however harmless such act may be, he loses the protection of the act whilst he is so engaged. In *Reed v. Great Western R. Co.* [1909] A. C. 31, the court said: "It is not that he violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment."

In *Moore v. Manchester Liners* [1909] 1 K. B. 417, 78 L. J. K. B. N. S. 463, 100 L. T. N. S. 164, 25 Times L. R. 202, a fireman left the ship and went ashore to procure articles which were necessary for his own convenience and comfort. On returning he fell from a ladder fastened to the ship's side and resting on the quay below. This was the only means of access to the ship. In giving judgment reversing the county court judge, who had awarded compensation, Cozens-Hardy, M. R., said: "It seems to me he [the seaman] was outside the protection



given by the act from the moment he left the ship until he got back onto the ship."

See also *Lowe v. Pearson* [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124; *Reed v. Great Western R. Co.* [1909] A. C. 31, 2 B. W. C. C. 109, 99 L. T. N. S. 781, 78 L. J. K. B. N. S. 31, 25 Times L. R. 36, 46 Scot. L. R. 700, 53 Sol. Jo. 31.

Of this case Mr. Ruegg says [p. 353]. "It is a decision of the House of Lords, and may be said to establish finally the principle propounded in the first decision given on the words, viz.: *Smith v. Lancashire & Y. R. Co.* supra. This principle is that where the workman is doing an act entirely for his own purposes, and in no way,

either directly or indirectly, in the interest of his employer, then, however harmless such an act may be, he loses the protection of the act whilst he is so engaged."

Many other cases might be cited to the same effect.

We are of opinion that there was no evidence to support the conclusion that the injury arose out of and in the course of Spooner's employment, and for that reason appellant is under no liability to the claimant in this case. This conclusion renders it unnecessary for us to consider the third proposition. The decision of the Industrial Accident Board is therefore reversed.

This case was originally assigned to the late Chief Justice McAlvay.

#### MICHIGAN SUPREME COURT

LIDA RAYNER

v.

SLIGH FURNITURE COMPANY, Plff. in Certiorari.

(180 Mich. 168, 146 N. W. 665.)

#### Master and servant — workmen's compensation act — collision with fellow employee.

An injury to an employee by collision with another employee, hidden from view by obstructions, in running to register on a time clock, which he was required to do before leaving the building when the quitting signal was given, arises out of and in the course of his employment within the meaning of the workmen's compensation act.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(McAlvay, Ch. J., dissents.)

(April 7, 1914.)

**C**ERTIORARI to the Industrial Accident Board to review an award by an arbitration committee in favor of applicant in a proceeding under the workmen's compensation act for the death of her husband. Affirmed.

The facts are stated in the opinion.

Mr. William A. Mulhern, with Mr. Francis D. Campau, for plaintiff in certiorari:

The accident to Adelbert Rayner did not arise out of or in the course of his employment.

*Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 1 W. C. C. 1, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64; *Shaw v. Wigan Coal & I. Co.* 3 B. W. C. C. 81; *Murphy v. Ber-*

*wick*, 2 B. W. C. C. 103, 43 Ir. Law Times, 126; *Morrison v. Clyde Nav. Co.* [1909] S. C. 59, 2 B. W. C. C. 99, 46 Scot. L. R. 38.

Messrs. Norris, McPherson, & Harrington, for defendant in certiorari:

The injury arose out of and in the course of Rayner's employment.

*Fitzgerald v. Clarke* [1908] 2 K. B. 796, 99 L. T. N. S. 101, 1 B. W. C. C. 197, 77 L. J. K. B. N. S. 1018; *Whitehead v. Reader* [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387; *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141, 1 W. C. C. 1, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64; *Shaw v. Wigan Coal & I. Co.* 3 B. W. C. C. 81; *Murphy v. Berwick*, 2 B. W. C. C. 103, 43 Ir. Law Times, 126; *Morrison v. Clyde Nav. Co.* [1909] S. C. 59, 2 B. W. C. C. 99, 46 Scot. L. R. 38.

Kuhn, J., delivered the opinion of the court:

This case is brought here by certiorari to the Industrial Accident Board. Adelbert Rayner, the applicant's husband, was injured while in respondent's factory in the city of Grand Rapids. About 100 carvers and cabinet workers were employed on the third floor of the factory, and, on the blowing of the noon whistle, each workman was required to proceed to the end of the room and punch the time clock before leaving for dinner. Mr. Rayner, who was working on this floor, about 150 feet from the time clock, on November 5, 1912, when the whistle blew at noon, started on a run from his bench to the clock to punch it. After proceeding about 30 feet, he collided with Martin De Vos, a fellow employee, whom he could not see because of drawers which were piled up on the floor. This resulted in Rayner fracturing or injuring one

**Note.**—For annotation on the workmen's compensation acts, see post, 23. L.R.A.1916A.

or more of his ribs. The injury to his side and ribs affected the pleura of his lungs, and from the inflammation or irritation which followed the lungs became affected, resulting in Mr. Rayner's death. There had been no general notice printed or posted of a rule against running to the time clock, but, about a year previous to the accident, Rayner had been told by his foreman, Hicks, not to run to the clock. There was testimony that the rule against running had not been enforced, and no employee had been discharged because of doing so. An award to claimant, who was left as his dependent, was made by a committee on arbitration, and upon review was affirmed by the Industrial Accident Board.

It is the contention of the respondent and appellant that the facts indicate that the accident and the resulting injury arose out of an act independent of the employment, in direct violation of a rule of the company, and solely for his own pleasure or convenience. With reference to the rule, the Commission made a finding that such a rule had not been enforced, and its general violation had been acquiesced in by the employer. There being evidence to support this finding of fact, by the terms of the act (part 3, § 12, Act No. 10, P. A., Extra Session 1912) 2 How. Stat. 2d ed. §§ 3939 et seq., it becomes conclusive, and as a result eliminates the consideration of the question as to whether the injury arose by reason of the intentional and wilful misconduct of Rayner. *Rumboll v. Nunnery Colliery Co.* 80 L. T. N. S. 42, 1 W. C. C. 28, 63 J. P. 132.

At the time of the accident, Rayner was in the performance of a duty imposed upon him by his employer. When the noon whistle blew, it was obligatory upon him, before leaving the place of his employment, to punch the time clock. The performance

of this duty, if not the proximate cause, was a concurring cause of his injury. In *Fitzgerald v. Clarke* (1908) 99 L. T. N. S. 101, 1 B. W. C. C. 197, Buckley, L. J., stated the rule as follows: "The words 'out of and in the course of the employment' are used conjunctively, not disjunctively, and, upon ordinary principles of construction, are not to be read as meaning 'out of,' that is to say, 'in the course of.'" The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment." We are well satisfied that the accident was an industrial accident within the meaning of the compensation act, and arose "out of and in the course of his employment." *Whitehead v. Reader* [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387.

The judgment and decision of the Industrial Accident Board is affirmed, with costs against appellant.

Brooke, Stone, Bird, Ostrander, Steere, and Moore, JJ., concurred with Kuhn, J.

McAlvay, Ch. J., dissenting:

I do not think that this was an industrial accident within the statute.





# TABLE OF CASES REPORTED AND CITED

## A

- Aberdeen Steam Traveling & Fishing Co. v. Peters** (1899) 1 Sc. Sess. Cas. 5th series, 786, 36 Scot. L. R. 573, 6 Scot. L. T. 378—204.
- Aberdeen Steam Traveling Co. v. Kemp**, cited in Ruegg Employers' Liability, 4th ed. p. 211, note (x)—204.
- Abram Coal Co. v. Southern** [1903] A. C. (Eng.) 306, 72 L. J. K. B. N. S. 691, 89 L. T. N. S. 103, 19 Times L. R. 579—158.
- Acres v. Frederick & Nelson** (1914) 79 Wash. 402, 140 Pac. 370, 5 N. C. C. A. 557—222, 435.
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- v. Thompson** (1911) 5 B. W. C. C. (Eng.) 19—37, 326.
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- Addie & Sons' Collieries v. Trainer** (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 115—125.
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- Alabama G. S. R. Co. v. Carroll**, 97 Ala. 126, 18 L.R.A. 433, 38 Am. St. Rep. 163, 11 So. 803—430.
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- Alderidge v. Merry** [1913] 2 I. R. 308, [1913] W. C. & Ins. Rep. 97, 47 Ir. Law Times, 5, 6 B. W. C. C. 450—58.
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- v. Oroya Brownhill Co.** (1910) 12 West. Australian L. R. 1—127.
- Allen v. Boston**, 159 Mass. 324, 38 Am. St. Rep. 423, 34 N. E. 519—280.
- v. Francis** [1914] 3 K. B. (Eng.) 1065, 30 Times L. R. 695, 83 L. J. K. B. N. S. 1814, 58 Sol. Jo. 753, 7 B. W. C. C. 779—188.
- v. Great Eastern R. Co.** [1914] 2 K. B. (Eng.) 243, 110 L. T. N. S. 498, [1914] W. N. 33, 83 L. J. K. B. N. S. 898, [1914] W. C. & Ins. Rep. 388—94.
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- v. Thomas Spowart & Co.** (1906) 43 Scot. L. R. 599—145.
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- Anderson v. Adams** [1913] W. C. & Ins. Rep. 506, 50 Scot. L. R. 855, 6 B. W. C. C. 874—43.
- v. Baird** (1903) 5 Sc. Sess. Cas. 5th series, 373, 40 Scot. L. R. 263—140, 386, 388.
- v. Balfour** [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. C. C. 588—38, 306, 309.
- v. Darnigvil Coal Co.** [1910] S. C. 456, 47 Scot. L. R. 342—171.
- v. Fife Coal Co.** (1910) 47 Scot. L. R. 3 [1910] S. C. 8, 3 B. W. C. C. 539—60, 331.
- v. Lochgelly Iron & Coal Co.** (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 187—195.
- Andrejwski v. Wolverine Coal Co.** (1914) 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807—216, 260, 261, 373.
- Andrew v. Faillsworth Industrial Soc.** 90 L. T. N. S. 611 [1904] 2 K. B. 32, 90 L. T. N. S. 611, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429—43, 239, 307, 341, 346, 347.



- Andrews v. Andrews** [1908] 2 K. B. (Eng.) 567, 77 L. J. K. B. N. S. 974, 99 L. T. N. S. 214, 24 Times L. R. 709, 1 B. W. C. C. 264—97, 196.
- Anglo-Australian Steam Nav. Co. v. Richards** (1911) 4 B. W. C. C. (Eng.) 247—145.
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- Appleby v. Horseley Co.** [1899] 2 Q. B. (Eng.) 521, 68 L. J. Q. B. N. S. 892, 80 L. T. N. S. 853, 47 Week. Rep. 614, 15 Times L. R. 410—103, 157, 158, 362.
- Arizona & N. M. R. Co. v. Clark** (1913) 125 C. A. 305, 207 Fed. 817, affirmed on appeal from decision on other points in 235 U. S. 669, 59 L. ed. 415, L.R.A.1915C, 834, 35 Sup. Ct. Rep. 210—216.
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- Armstrong v. Industrial Commission** (1915) —Wis. —, 154 N. W. 845—251.
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- Arniston Coal Co. v. King** [1913] S. C. 892, 50 Scot. L. R. 685, [1913] W. C. & Ins. Rep. 388, 6 B. W. C. C. 826—186.
- Arnott v. Fife Coal Co.** [1911] S. C. 1029, 48 Scot. L. R. 828, 4 B. W. C. C. 361—162.
- v. Fife Coal Co.** [1912] S. C. 1262, 49 Scot. L. R. 902, 6 B. W. C. C. 281—141, 162.
- Arrol v. Kelly** (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 906—126.
- Ashley v. Lilleshall Co.** (1911) 5 B. W. C. C. (Eng.) 85—39.
- Ashmore v. Lillie** [1915] W. C. & Ins. Rep. (Eng.) 7, 8 B. W. C. C. 89—148.
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- Atkinson v. Lumb** [1903] 1 K. B. (Eng.) 861, 72 L. J. K. B. N. S. 460, 88 L. T. N. S. 789, 19 Times L. R. 412, 5 W. C. C. 106, 67 J. P. 414, 51 Week. Rep. 516—193, 196, 208.
- Atlantic Coast Line R. Co. v. Georgia**, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829—454, 460.
- Aylesworth v. Phoenix Cheese Co.** (1915) —App. Div. —, 155 N. Y. Supp. 916—217.
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- Ayres v. Buckeridge** [1902] 1 K. B. (Eng.) 57, 71 L. J. K. B. N. S. 28, 65 J. P. 804, 50 Week. Rep. 115, 85 L. T. N. S. 472, 18 Times L. R. 20—156.

## B

- Babcock v. Pearson** [1913] S. C. 959, 50 Scot. L. R. 790, [1913] W. C. & Ins. Rep. 430, 6 B. W. C. C. 841—185.
- v. Young** [1911] S. C. 406, 48 Scot. L. R. 298, 4 B. W. C. C. 367—151.
- Back v. Dick** [1906] A. C. (Eng.) 325, 75 L. J. K. B. N. S. 569, 94 L. T. N. S. 802, 8 W. C. C. 40, 22 Times L. R. 548—193, 196.
- Bacon v. United States Mut. Acci. Asso.** 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399—278.
- Bagley v. Furness** [1914] 3 K. B. (Eng.) 974, 83 L. J. K. B. N. S. 1546, [1914] W. N. 300, 7 B. W. C. C. 560—166.
- Bagnall v. Levinstein** [1907] 1 K. B. (Eng.) 531, 76 L. J. K. B. N. S. 234, 96 L. T. N. S. 184, 23 Times L. R. 165—115.
- Bailey v. Kenworthy** [1908] 1 K. B. (Eng.) 441—153.
- v. Plant** [1901] 1 K. B. (Eng.) 31, 70 L. J. Q. B. N. S. 63, 65 J. P. 49, 49 Week. Rep. 103, 83 L. T. N. S. 459, 17 Times L. R. 48—188.
- Baird v. Ancient Order of Foresters** [1914] S. C. 965, 51 Scot. L. R. 819, 7 B. W. C. C. 943—187.
- v. Birsztan** (1906) 8 Sc. Sess. Cas. (Scot.) 5th series, 438—126, 371.
- v. Burley** [1908] S. C. 545, 45 Scot. L. R. 415, 1 B. W. C. C. 7—48.
- v. Kane** (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 461—161.
- v. M'Whinnie** [1908] S. C. 440, 45 Scot. L. R. 338, 1 B. W. C. C. 109—144.
- v. Robson** (1914) 51 Scot. L. R. 747, 2 Scot. L. T. 92, 7 B. W. C. C. 925—45.
- v. Stevenson** [1906-07] S. C. (Scot.) 1259—166, 188.
- Baker v. Jewell** [1910] 2 K. B. (Eng.) 673, 79 L. J. K. B. N. S. 1092, 103 L. T. N. S. 173, 3 B. W. C. C. 503—145.
- Ball v. Hunt** [1912] A. C. (Eng.) 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459—136, 147, 255, 379, 381.
- v. Hunt** [1911] 1 K. B. 1048, 80 L. J. K. B. N. S. 655, 104 L. T. N. S. 327, 27 Times L. R. 323, 55 Sol. Jo. 383, 4 B. W. C. C. 225—136, 255, 379.
- Baltimore & O. S. W. R. Co. v. Reed**, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488—430.

- Banknock Coal Co. v. Lawrie** [1912] A. C. (Eng.) 105, 81 L. J. P. C. N. S. 89, 106 L. T. N. S. 283, [1912] W. C. Rep. 1, 5 B. W. C. C. 209, 28 Times L. R. 136, [1912] S. C. 20, 49 Scot. L. R. 98—**128**.
- Barbeary v. Chugg** (1915) 84 L. J. K. B. N. S. (Eng.) 504, 112 L. T. N. S. 797, 31 Times L. R. 153, [1904] W. C. & Ins. Rep. 174, 8 B. W. C. C. 37—**37, 291**.
- Barbour Flax Spinning Co. v. Hagerty** (1913) 85 N. J. L. 407, 89 Atl. 919, 4 N. C. C. A. 586—**264**.
- Barclay v. McKinnon** (1901) 3 Sc. Sess. Cas. 5th series, 436, 38 Scot. L. R. 321, 8 Scot. L. T. 404, appeal dismissed in [1901] A. C. (Eng.) 269, 85 L. T. N. S. 286, 4 W. C. C. 149—**195**.
- Bargewell v. Daniel**, 98 L. T. N. S. 257—**364**.
- Bargey v. Massaro Macaroni Co.** (1915) — App. Div. —, 155 N. Y. Supp. 1076—**218**.
- Barker v. Holmes** (1904; C. C.) 117 L. T. Jo. (Eng.) 158, 6 W. C. C. 52—**88**.
- Barnabas v. Bershan Colliery Co.** 103 L. T. N. S. 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119, 48 Scot. L. R. 727—**32, 295, 301, 335**.
- Barnes v. Evans** (1914) W. C. & Ins. Rep. (Eng.) 113, 7 B. W. C. C. 24—**119**.
- v. Nunnery Colliery Co.** [1910] W. N. (Eng.) 248, 45 L. J. N. C. 757, aff'd in [1912] A. C. (Eng.) 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, [1912] W. C. Rep. 90, [1911] W. N. 251, 5 B. W. C. C. 195—**54, 55, 239**.
- Barnes Case.** See *Barnes v. Nunnery Colliery Co.*
- Barnett v. Port of London Authority** (1913) 108 L. T. N. S. (Eng.) 944, 82 L. J. K. B. N. S. 918, 57 Sol. Jo. 577, [1913] W. C. & Ins. Rep. 414, 6 B. W. C. C. 466—**182**.
- v. Port of London Authority** [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252, [1913] W. C. & Ins. Rep. 250, [1913] W. N. 35, 57 Sol. Jo. 282, 6 B. W. C. C. 105—**150, 151, 156**.
- Barrett v. Grays Harbor Commercial Co.** (1913) 209 Fed. 95, 4 N. C. C. A. 756—**222**.
- v. Kemp Bros.** [1904] 1 K. B. (Eng.) 517, 73 L. J. K. B. N. S. 138, 68 J. P. 196, 52 Week. Rep. 257, 90 L. T. N. S. 305, 20 Times L. R. 162, 7 W. C. C. 78—**203**.
- v. North British R. Co.** (1899) 1 Sc. Sess. Cas. 5th series, 1139, 36 Scot. L. R. 874, 7 Scot. L. T. 88—**125**.
- Barrie v. Diamond Coal Co.** (1914; Alberta) 7 B. W. C. C. 1061—**87**.
- Barron v. Blair & Co.** (1915) 8 B. W. C. C. (Eng.) 501—**141**.
- v. Carmichael** (1912) 5 B. W. C. C. (Eng.) 436—**80**.
- Barron v. Seaton Burn Coal Co.** [1915] 1 K. B. (Eng.) 756, 112 L. T. N. S. 897, 31 Times L. R. 199, 84 L. J. K. B. N. S. 682, [1915] W. C. & Ins. Rep. 132, [1915] W. N. 70, 59 Sol. Jo. 315, 8 B. W. C. C. 218—**110**.
- Bartell v. Gray** [1902] 1 K. B. (Eng.) 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70, 4 W. C. C. 95—**205, 211**.
- Bartlett v. Tutton** [1902] 1 K. B. (Eng.) 72, 71 L. J. K. B. N. S. 52, 66 J. P. 196, 50 Week. Rep. 149, 85 L. T. N. S. 531, 18 Times L. R. 35—**150, 373**.
- Barton v. Pepin County Agri. Soc.** 83 Wis. 19, 52 N. W. 1129—**[17] 481**.
- v. Scott** (1910) 4 B. W. C. C. (Eng.) 15—**180**.
- Basanta v. Canadian P. R. Co.** (1911) 16 B. C. 304—**178, 208**.
- Bate v. Worsey** [1912] W. C. Rep. (Eng.) 194, 5 B. W. C. C. 276—**102, 362**.
- Bateman v. Albion Combining Co.** [1914] W. C. & Ins. Rep. (Eng.) 18, 7 B. W. C. C. 47—**43**.
- Bateman Mfg. Co. v. Smith** (1913) 85 N. J. L. 409, 89 Atl. 979, 4 N. C. C. A. 588—**263**.
- Bates v. Davies** (1909; C. C.) 126 L. T. Jo. (Eng.) 454, 2 B. W. C. C. 459—**46**.
- v. Holding** [1914] W. C. & Ins. Rep. (Eng.) 6, 7 B. W. C. C. 80—**190**.
- v. Mirfield Coal Co.** [1913] W. C. & Ins. Rep. (Eng.) 180, 6 B. W. C. C. 165—**55**.
- Bates-Smith v. General Motor Cab Co.** [1911] A. C. (Eng.) 188, 80 L. J. K. B. N. S. 839, 27 Times L. R. 370, 4 B. W. C. C. 249—**114**.
- Bathgate v. Caledonian R. Co.** (1901) 4 Sc. Sess. Cas. 5th series, 313, 39 Scot. L. R. 246, 9 Scot. L. T. 334—**194**.
- Batista v. West Jersey & S. R. Co.** (1913) — N. J. L. —, 88 Atl. 954—**251, 370**.
- Battis v. Hamlin**, 22 Wis. 669—**377**.
- Baur v. Court of Common Pleas** (1915) — N. J. L. —, 95 Atl. 627—**216, 245, 261, 263**.
- Baxter v. Chicago & N. W. R. Co.** 104 Wis. 307, 80 N. W. 644, 6 Am. Neg. Rep. 746—**[6] 470**.
- Bayne v. Riverside Storage & Cartage Co.** (1914) 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837—**230, 292**.
- Bayon v. Beckley** (1915) 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588—**217, 220, 271**.
- Beadle v. Nicholas** [1909] W. N. (Eng.) 227, 101 L. T. N. S. 586—**183**.
- Beale v. Fox** (1909; C. C.) 126 L. T. Jo. (Eng.) 257, 2 B. W. C. C. 467—**77, 357**.
- Beare v. Garrod** (1915) 8 B. W. C. C. (Eng.) 474—**181**.
- Beath v. Ness** (1903) 6 Sc. Sess. Cas. 5th series, 168, 41 Scot. L. R. 113, 11 Scot. L. T. 455—**144**.



- Beaumont v. Underground Electric R. Co.** [1912] W. C. Rep. (Eng.) 123, 5 B. W. C. C. 247—**33, 295.**
- Beck v. Hill & Sons** (1915) 8 B. W. C. C. (Eng.) 592—**115.**
- Beckley v. Scott** [1902] 2 L. R. (Ir.) 504—**72, 73.**
- Beddard v. Stanton Ironworks Co.** [1913] W. C. & Ins. Rep. (Eng.) 535, 6 B. W. C. C. 627—**138.**
- Bedwell v. London Electric R. Co.** (1914) 7 B. W. C. C. (Eng.) 685—**80.**
- Bee v. Ovens** (1900) 2 Sc. Sess. Cas. 5th series, 439, 37 Scot. L. R. 328, 7 Scot. L. T. 362—**98.**
- Beech v. Bradford Corp.** (1911) 4 B. W. C. C. (Eng.) 236—**189.**
- Behringer v. Inspiration Consol. Copper Co.** (1915) — Ariz. —, 149 Pac. 1065—**223.**
- Belfast, The**, 7 Wall. 624, 19 L. ed. 266—**440.**
- Bell v. Whitton** (1899) 1 Sc. Sess. Cas. 5th series, 942, 36 Scot. L. R. 754, 7 Scot. L. T. 59—**194.**
- Bellamy v. Humphries** [1913] W. C. & Ins. Rep. (Eng.) 169, 6 B. W. C. C. 53—**37, 42, 326.**
- Belsey v. Sadler** (1899; C. C.) 1 W. C. C. (Eng.) 141—**208.**
- Bender v. The Zent** [1909] 2 K. B. (Eng.) 41, 78 J. K. B. N. S. 533, 100 L. T. N. S. 639, 2 B. W. C. C. 22—**69.**
- Bennett v. Aird** (1899; C. C.) 107 L. T. Jo. (Eng.) 550, 1 W. C. C. 138—**201, 208.**
- v. Wordie** (1899) 1 F. 855, 36 Scot. L. R. 643, 7 Scot. L. T. 10—**85.**
- Benson v. Lancashire & Y. R. Co.** [1904] 1 K. B. (Eng.) 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 243, 89 L. T. N. S. 715, 20 Times L. R. 139—**46.**
- v. Metropolitan Asylums Board** (1908) 124 L. T. Jo. 403—**202.**
- Bentley's Case** (1914) 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559—**251, 266, 268, 370.**
- Berger v. Berger**, 104 Wis. 282, 76 Am. St. Rep. 877, 80 N. W. 585—**377.**
- Bernard v. Michigan United Traction Co.** (1915) — Mich. —, 154 N. W. 565—**222.**
- Berry v. Canteen & Mess. Co-op. Soc.** (1910) 3 B. W. C. C. (Eng.) 449—**94.**
- Berton v. Tietjen & L. Dry Dock Co.** 219 Fed. 763—**462.**
- Besnys v. Herman Zohrlaut Leather Co.** (1914) 157 Wis. 203, 147 N. W. 37, 5 N. C. C. A. 282—**244.**
- Bett v. Hughes** (1914) 52 Scot. L. R. 93, [1915] S. C. 150, 8 B. W. C. C. 362—**43, 315.**
- Bevan v. Crawshaw Bros.** [1902] 1 K. B. (Eng.) 25, 71 L. J. K. B. N. S. 49, 85 L. T. N. S. 496, 50 Week. Rep. 98—**134.**
- v. Energlyn Colliery Co.** [1912] 1 K. B. (Eng.) 63, [1911] W. N. 206, 105 L. T. N. S. 654, 28 Times L. R. 27, 81 L. J. K. B. N. S. 172, 5 B. W. C. C. 169—**144.**
- Biggart v. The Minnesota** (1911) 5 B. W. C. C. (Eng.) 68—**66.**
- Bigwood v. Boston & N. Street R. Co.** 209 Mass. 345, 35 L.R.A.(N.S.) 113, 95 N. E. 751—**335.**
- Billings v. Holloway** [1899] 1 Q. B. (Eng.) 70, 168 L. J. Q. B. N. S. 16, 79 L. T. N. S. 396, 47 Week. Rep. 105, 15 Times L. R. 53—**197.**
- Bines v. Gueret** [1913] W. C. & Ins. Rep. (Eng.) 158, 6 B. W. C. C. 120—**69.**
- Binning v. Easton** (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 407—**180.**
- Binns v. Kearley** (1913) 6 B. W. C. C. (Eng.) 608—**141.**
- Birks v. Stafford Coal & I. Co.** [1913] 3 K. B. (Eng.) 686, 109 L. T. N. S. 290, 82 L. J. K. B. N. S. 1334, [1913] W. N. 238, 57 Sol. Jo. 729, 6 B. W. C. C. 617—**110.**
- Birmingham v. Lehigh & W. Coal Co.** (1915) — N. J. L. —, 95 Atl. 242—**216, 257, 263, 272.**
- Birmingham Cabinet Mfg. Co. v. Dudley** (1910) 102 L. T. N. S. (Eng.) 619, 3 B. W. C. C. 169—**170.**
- Bist v. London & S. W. R. Co.** [1907] A. C. (Eng.) 209, 76 L. J. K. B. N. S. 703, 96 L. T. N. S. 750, 23 Times L. R. 471, 8 Ann. Cas. 1—**77, 357.**
- Black v. Fife Coal Co.** (1909) S. C. 152, 46 Scot. L. R. 191, reversed by the House of Lords in 5 B. W. C. C. (Eng.) 217—**82.**
- v. Merry** [1909] S. C. 1150, 46 Scot. L. R. 812—**144.**
- v. New Zealand Shipping Co.** [1913] W. C. & Ins. Rep. (Eng.) 480, 6 B. W. C. C. 720—**36, 290.**
- Blackford v. Green** (1915) — N. J. L. —, 94 Atl. 401—**264, 265.**
- Blain v. Greenock Foundry Co.** (1903) 5 Sc. Sess. Cas. 5th series, 893, 40 Scot. L. R. 639, 11 Scot. L. T. 92—**72.**
- Blake v. Head** [1912] W. C. Rep. (Eng.) 198, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303—**65, 240, 307, 310.**
- v. Midland R. Co.** [1904] 1 K. B. (Eng.) 503, 73 L. J. K. B. N. S. 179, 68 J. P. 215, 90 L. T. N. S. 433, 20 Times L. R. 191—**186.**
- Blanz v. Erie R. Co.** (1913) 84 N. J. L. 35, 85 Atl. 1030—**253.**
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- v. Scott**, 3 W. C. C. 33—**297.**
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- Brice v. Lloyd** [1909] 2 K. B. (Eng.) 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744—**55.**
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- v. Turvey** [1904] 1 K. B. (Eng.) 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 660, 20 Times L. R. 129—**37, 326.**
- British & S. A. Steam Nav. Co. v. Neil** (1910) 3 B. W. C. C. (Eng.) 413—**94, 191.**
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- v. Lochgelly Iron & Coal Co.** [1907] S. C. (Scot.) 198—90.
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- v. Watson** [1915] A. C. (Eng.) 1, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, [1914] W. N. 195, 7 B. W. C. C. 257, 83 L. J. P. C. N. S. 307, [1914] W. C. & Ins. Rep. 228, reversing [1913] S. C. 593, 50 Scot. L. R. 415, [1913] W. C. & Ins. Rep. 223, 6 B. W. C. C. 416—37.
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- Bryant v. Fissell**, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585—227, 231-233, 241, 242, 266, 298, 316, 325, 341, [13] 477.
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v. **Hughes** [1911] 2 K. B. (Eng.) 738, 80 L. J. K. B. N. S. 1307, 105 L. T. N. S. 274, 27 Times L. R. 498, 4 B. W. C. C. 291—171.
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- v. Rhymney Iron Co.** (1900) 16 Times L. R. (Eng.) 329, 2 W. C. C. 22—60, 331.
- Davis v. Hill's Plymouth Colliery**, 3 B. W. C. C. 514—301.
- v. New York & N. E. R. Co.** 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815—430.
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- v. Chicago, R. I. & P. R. Co.** 266 Ill. 258, 107 N. E. 595—459.
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- Dierkes v. Hauxhurst Land Co.** 80 N. J. L. 369, 34 L.R.A.(N.S.) 693, 79 Atl. 361, 83 N. J. L. 623, 83 Atl. 911—317.
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## E

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- v. Godfrey** [1899] 2 Q. B. (Eng.) 333, 68 L. J. Q. B. N. S. 666, 80 L. T. N. S. 672, 15 Times L. R. 365, 47 Week. Rep. 551—81.
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- v. Ellis** [1905] 1 K. B. (Eng.) 324, 74 L. J. K. B. N. S. 229, 53 Week. Rep. 311, 92 L. T. N. S. 718, 21 Times L. R. 182—117.
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- Elvin v. Woodward** [1903] 1 K. B. (Eng.) 838, 72 L. J. K. B. N. S. 468, 67 J. P. 413, 51 Week. Rep. 518, 88 L. T. N. S. 671, 19 Times L. R. 410—199.
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- Evans v. Astley** [1911] A. C. (Eng.) 674, 80 L. J. K. B. N. S. 1177, 105 L. T. N. S. 385, 27 Times L. R. 557, 4 B. W. C. C. 319—50.
- v. Barrow Hæmatite Steel Co.** (1914) 7 B. W. C. C. (Eng.) 681—145, 178.
- v. Cook** [1905] 1 K. B. (Eng.) 53, 74 L. J. K. B. N. S. 95, 92 L. T. N. S. 43, 21 Times L. R. 42, 56 Week. Rep. 81—81, 212.
- v. Cory Bros.** [1912] W. C. Rep. (Eng.), 199, 5 B. W. C. C. 272—137.



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- v. Gwauncaegurwen Colliery Co.** [1912] W. C. Rep. (Eng.) 213, 106 L. T. N. S. 613, 5 B. W. C. C. 441—**183.**
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- v. Wilson** (1907; C. C.) 124 L. T. Jo. (Eng.) 201, 1 B. W. C. C. 148—**206.**
- Everitt v. Eastaff** [1913] W. C. & Ins. Rep. (Eng.) 164, 6 B. W. C. C. 184—**46.**
- Ewald v. Chicago & N. W. R. Co.** 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12—**328.**
- Eydmann v. Premier Accumulator Co.** [1915] W. C. & Ins. Rep. (Eng.) 82, 8 B. W. C. C. 121—**88, 91.**
- Eyre v. Houghton Main Colliery Co.** [1910] 1 K. B. (Eng.) 695, 79 L. J. K. B. N. S. 698, 102 L. T. N. S. 385, 26 Times L. R. 302, 54 Sol. Jo. 304, 3 B. W. C. C. 250—**148.**
- F**
- Fabro v. Superior Coal Co.** (1914) 188 Ill. App. 203—**220.**
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- Faircloth v. Waring & Gillow** (1906; C. C.) 8 W. C. C. (Eng.) 99—**154.**
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- Federal Gold Mine v. Ennor** (1910; H. C. Austr.) 13 C. L. R. (Austr.) 276—**33, 180, 294.**
- Feinmen v. Albert Mfg. Co.** (1915) — App. Div. —, 155 N. Y. Supp. 909—**258.**
- Feldman v. Braunstein** (1915) — N. J. L. —, 93 Atl. 679—**259, 388.**
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- Ferguson v. Brick & Supplies** (1914; Alberta) 7 B. W. C. C. 1054—**45, 82.**
- v. Green** [1901] 1 K. B. (Eng.) 25, 70 L. J. K. B. N. S. 21, 64 J. P. 819, 49 Week. Rep. 105, 83 L. T. N. S. 461, 17 Times L. R. 41—**199.**
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- Ferriter v. Port of London Authority** [1913] W. C. & Ins. Rep. (Eng.) 455, 6 B. W. C. C. 732—**73.**
- Field v. Longden** [1902] 1 K. B. (Eng.) 47, 71 L. J. K. B. N. S. 120, 66 J. P. 291, 50 Week. Rep. 212, 85 L. T. N. S. 571, 18 Times L. R. 65—**27, 79.**
- Fife Coal Co. v. Davidson** [1906-07] S. C. (Scot.) 90—**186.**
- v. Lindsay** [1908] S. C. 431, 45 Scot. L. R. 317, 1 B. W. C. C. 117—**186.**
- v. Wallace** [1909] S. C. 683, 46 Scot. L. R. 727, 2 B. W. C. C. 264—**125.**
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- Finlayson v. Clinton** (1914) 7 B. W. C. C. (Eng.) 710—**182.**
- Finnie v. Duncan** (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 254—**161.**
- First Nat. Bank v. Industrial Commission** (1915) — Wis. —, 154 N. W. 847—**243, 266, 268.**
- Fisher's Case** (1915) 220 Mass. 581, 108 N. E. 361—**230, 267, 294.**
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- v. Lozier Motor Co.** (1915) — Mich. —, 154 N. W. 67—**242, 268.**
- Fitzpatrick v. Hindley Field Colliery Co.** 3 W. C. C. 37—**329.**
- v. Hindley Field Colliery Co.** [1901] 4 W. C. C. (Eng.) 7—**61, 332.**
- Fleet v. Johnson** (1913) W. C. & Ins. Rep. (Eng.) 149, 29 Times L. R. 207, 57 Sol. Jo. 226, 6 B. W. C. C. 60—**71, 133, 292.**
- Fleming v. Lochgelly Iron & Coal Co.** (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Scot. L. R. 684, 10 Scot. L. T. 114—**149, 157.**
- Fletcher v. Hawley** (1905) 21 Times L. R. (Eng.) 191—**200.**
- v. London United Tramways** [1902] 2 K. B. (Eng.) 269, 71 L. J. K. B. N. S. 653, 66 J. P. 596, 50 Week. Rep. 597, 86 L. T. N. S. 700, 18 Times L. R. 639—**200.**
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- Floccher v. Fidelity & D. Co.** (1915) — Mass. —, 108 N. E. 1032—**258, 259, 388.**

- Flowers v. Chambers** [1899] 2 Q. B. (Eng.) 142, 1 W. C. C. 51—**203, 204.**
- Fogarty v. Wallis** [1903] 2 I. R. (Ir.) 522—**207.**
- Follis v. Schaafe Mach. Works** (1908) 13 B. C. 471, 1 B. W. C. C. 442—**125.**
- Ford v. Gaiety Theatre** [1914] W. C. & Ins. Rep. (Eng.) 53, 7 B. W. C. C. 197—**87.**
- v. Oakdale Colliery Co.** (1915) 8 B. W. C. C. (Eng.) 127—**122.**
- v. Wren** (1903) 115 L. T. Jo. (Eng.) 357, 5 W. C. C. 48—**74.**
- Forrest v. Roper Furniture Co.** (1915) 267 Ill. 331, 108 N. E. 328—**224.**
- Forrester v. McCallum** (1901) 3 Sc. Sess. Cas. 5th series, 650, 38 Scot. L. R. 448, 8 Scot. L. T. 486—**134.**
- Foth v. Macomber & W. Rope Co.** (1915) — Wis. —, 154 N. W. 369—**246.**
- Fowler v. Hughes** (1903) 5 Sc. Sess. Cas. 5th series, 394, 40 Scot. L. R. 321, 10 Scot. L. T. 583—**73.**
- Fox v. Barrow Hematite Steel Co.** (1915) 84 L. J. K. B. N. S. (Eng.) 1327—**84, 91.**
- v. Battersea Borough Council** (1911) 4 B. W. C. C. (Eng.) 261—**142, 185.**
- Francis v. Turner Bros.** [1900] 1 Q. B. (Eng.) 478, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105, 2 W. C. C. 61—**195, 200, 209, 211.**
- Fraser v. Great North of Scotland R. Co.** (1901) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96—**85, 144.**
- Frazer v. Riddell** [1914] S. C. 125, 2 Scot. L. T. 377, 51 Scot. L. R. 110, [1914] W. C. & Ins. Rep. 125, 7 B. W. C. C. 841—**63, 352.**
- Fredenburg v. Empire United R. Co.** (1915) 168 App. Div. 618, 154 N. Y. Supp. 351—**257, 261.**
- Fred E. Sanders, The** (1913) 208 Fed. 724, 4 N. C. C. A. 891, 212 Fed. 545, 5 N. C. C. A. 97—**462.**
- Freeland v. Macfarlane** (1900) 2 Sc. Sess. Cas. 5th series, 832, 37 Scot. L. R. 599, 7 Scot. L. T. 456—**72, 144, 169.**
- Freeman v. Mercantile Mut. Acci. Asso.** 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013—**280.**
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- v. Underwood** (1903) 19 Times L. R. (Eng.) 416—**121.**
- Frid v. Fenton** (1900) 82 L. T. N. S. (Eng.) 193, 69 L. J. Q. B. N. S. 437, 16 Times L. R. 267—**198.**
- Frischia v. Drake Bros. Co.** (1915) 167 App. Div. 496, 153 N. Y. Supp. 392—**251, 253.**
- Frith v. The Louisiana** [1912] 2 K. B. (Eng.) 155, 81 L. J. K. B. N. S. 701, [1912] W. C. Rep. 285, 5 B. W. C. C. 410, 106 L. T. N. S. 667, [1912] W. N. 98, 28 Times L. R. 331—**63, 351.**
- Fry v. Cheltenham Corp.** (1911) 81 L. J. K. B. N. S. (Eng.) 41, 105 L. T. N. S. 495, 28 Times L. R. 16, 76 J. P. 89, 56 Sol. Jo. 33, [1911] W. N. 199, [1912] W. C. Rep. 105, 5 B. W. C. C. 162, 10 L. G. R. 1—**84, 89.**
- Fulford v. Northfleet Coal & Ballast Co.** 1 B. W. C. C. 222—**30, 35, 302, 303.**
- Fulgham v. Midland Valley R. Co.** (C. C.) 167 Fed. 660—**455.**
- Fuller v. Chicopee Mfg. Co.** 16 Gray, 46—**280.**
- Fullick v. Evans** (1901) 84 L. T. N. S. (Eng.) 413, 17 Times L. R. 346—**200.**
- Fumiciello's Case** (1914) 219 Mass. 488, 107 N. E. 349—**235, 331.**
- Furness v. Bennett** (1910) 3 B. W. C. C. (Eng.) 195—**148.**
- Furniss v. Gartside** (1909) 3 B. W. C. C. (Eng.) 411—**56.**
- Furnivall v. Johnson's Iron & Steel Co.** (1911) 5 B. W. C. C. (Eng.) 43—**67, 71.**

## G

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- Gallant v. The Gabir** [1913] W. C. & Ins. Rep. (Eng.) 116, 108 L. T. N. S. 50, 29 Times L. R. 198, 57 Sol. Jo. 225, 12 Asp. Mar. L. Cas. 284, 6 B. W. C. C. 9—**50.**
- Galvin v. Parker**, 154 Mass. 346, 28 N. E. 244—**364.**
- Gane v. Norton Hill Colliery Co.** [1909] 2 K. B. (Eng.) 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42—**61, 237, 301, 319, 331, 332.**
- Garcia v. Industrial Acci. Commission** (1915) — Cal. —, 151 Pac. 741—**251.**
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- v. Wilson** (1899) 1 Sc. Sess. Cas. 5th series, 1017, 36 Scot. L. R. 777, 7 Scot. L. T. 65—**208.**
- v. Wishart** (1914; H. L. Sc.) 30 Times L. R. 540, [1914] W. N. 232, 58 Sol. Jo. 592, 51 Scot. L. R. 516, 83 L. J. P. C. N. S. 321, 111 L. T. N. S. 466, [1914] S. C. (H. L.) 53, [1914] W. C. & Ins. Rep. 202, 7 B. W. C. C. 348—**163, 166, 167.**
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- Golder v. Caledonian R. Co.** (1902) 5 Sc. Sess. Cas. 5th Series (Scot.) 123—**34, 293.**
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- v. Canadian P. R. Co.** (1913) 7 B. W. C. C. (Sask.) 1041—**58, 323.**
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- Gorrell v. Battelle** (1914) 93 Kan. 370, 144 Pac. 244—**221, 255, 262, 380.**
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- Gotobed v. Petchell** [1914] 2 K. B. (Eng.) 36, 83 L. J. K. B. N. S. 429, 110 L. T. N. S. 453, 30 Times L. R. 253, 58 Sol. Jo. 249, [1914] W. N. 33, [1914] W. C. & Ins. Rep. 115, 7 B. W. C. C. 109—**173.**
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- v. Reed** [1913] W. C. & Ins. Rep. (Eng.) 127, 108 L. T. N. S. 53, 6 B. W. C. C. 43—146, 148, 163, 171, 380.
- v. Shotts Iron Co.** [1912] S. C. 1267, 49 Scot. L. R. 906, 6 B. W. C. C. 287—162.
- v. Southend Corp.** [1913] W. C. & Ins. Rep. (Eng.) 393, 6 B. W. C. C. 932—178.
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- Great Northern R. Co. v. Dawson** [1905] 1 K. B. (Eng.) 331, 74 L. J. K. B. N. S. 271, 53 Week. Rep. 309, 92 L. T. N. S. 145, 21 Times L. R. 193—160.
- v. Whitehead** (1902) 18 Times L. R. (Eng.) 816—103, 362.
- Great North of Scotland R. Co. v. Fraser** (1900) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96—72.
- Great Western Power Co. v. Pillsbury** (1915) — Cal. —, 149 Pac. 35—243, 244, 269, 270, 355-357, 411.
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- Greene v. Shaw** [1912] 2 I. R. 430, [1912] W. C. Rep. 25, 46 Ir. Law Times, 18, 5 B. W. C. C. 573—42, 48, 314.
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- v. Waclark Wire Works** (1914) 86 N. J. L. 610, 92 Atl. 354,—214, 221, 222.
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- Griffin v. Houlder Line** [1904] 1 K. B. (Eng.) 510, 73 L. J. K. B. N. S. 202, 63 J. P. 213, 52 Week. Rep. 323, 90 L. T. N. S. 142, 20 Times L. R. 255, 6 W. C. C. 107—204.
- Griffiths v. Atkinson** (1912) 106 L. T. N. S. (Eng.) 852, [1912] W. C. Rep. 277, 5 B. W. C. C. 345—84, 92.
- v. Gilbertson** [1915] W. N. (Eng.) 253, 84 L. J. K. B. N. S. 1312—153, 154.
- v. North's Nav. Collieries** (1911) 5 B. W. C. C. (Eng.) 21—40.
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- v. Wynnstay Collieries Co.** (1909) 2 B. W. C. C. (Eng.) 450—180.
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- Grime v. Fletcher** [1915] 1 K. B. (Eng.) 734, 31 Times L. R. 158, 50 L. J. 55, 84 L. J. K. B. N. S. 847, 8 B. W. C. C. 69, [1915] W. N. 43, 59 Sol. Jo. 233—84, 88, 89, 133, 339.
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- v. McGinnis**, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806—456.
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## H

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- v. Humphreys** (1899) 1 W. C. C. (Eng.) 117—183.
- Hains v. Corbet** (1912) 5 B. W. C. C. (Eng.) 372—159, 374.
- Hainsborough v. Ralli Bros.** (1902) 18 Times L. R. (Eng.) 21—209.
- Haley v. United Collieries** [1907] S. C. 216, 44 Scot. L. R. 584—41.
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- Hall v. Snowden** [1899] 2 Q. B. (Eng.) 136, 1 W. C. C. 73—203.
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- Halls v. Furness** (1909) 3 B. W. C. C. (Eng.) 72—184.
- Halstead v. Thomson** (1901) 3 Sc. Sess. Cas. 5th series, 668, 38 Scot. L. R. 473—197, 198.
- Halvorsen v. Salvesen** (1911) 49 Scot. L. R. 27—66.
- Hamilton, The**, 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133—439, 448.
- Hammill v. Pennsylvania R. Co.** (1915) — N. J. L. —, 94 Atl. 313—249, 262, 434, 463.
- Hampton v. St. Louis, I. M. & S. R. Co.** 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263—453.
- Hancock v. British Westinghouse Electric Co.** (1910) 3 B. W. C. C. (Eng.) 210—88.
- Handford v. Clark** [1907] 2 K. B. (Eng.) 409, 76 L. J. K. B. N. S. 958, 97 L. T. N. S. 124, 9 W. C. C. 87—210.
- Hanley v. Niddrie & B. Coal Co.** [1909-10] S. C. (Scot.) 875—186.
- Hanlin v. Melrose** (1899) 1 Sc. Sess. Cas. 5th series, 1012, 36 Scot. L. R. 814, 7 Scot. L. T. 67—125.
- Hanlon v. North City Mill Co.** (1903) 2 I. R. (Ir.) 163—205.
- Hanson v. Great Central R. Co.** (1901; C. C.) 3 W. C. C. (Eng.) 152—213.
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- Harding v. Brynadu Colliery Co.** [1911] 2 K. B. (Eng.) 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269—54, 78.
- v. Royal Mail Steam Packet Co.** (1911) 4 B. W. C. C. (Eng.) 59—161.
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- Hargreave v. Haughhead Coal Co.** [1912] A. C. (Eng.) 319, [1912] S. C. (H. L.) 70, 81 L. J. P. C. N. S. 167, 106 L. T. N. S. 468, [1912] W. C. Rep. 275, [1912] W. N. 79, 56 Sol. Jo. 379, 49 Scot. L. R. 474, 5 B. W. C. C. 445—138.
- Harland v. Radcliffe** (1909) 43 Ir. L. T. 166, 2 B. W. C. C. 374—163.
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- v. Hobart Iron Co.** (1914) 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44—221, 222.
- Harrison v. Dowling** (1915) 31 Times L. R. (Eng.) 486—161.
- v. Ford** (1915) 8 B. W. C. C. (Eng.) 429—141.
- v. Oceanic Steam Nav. Co.** [1907] 2 K. B. (Eng.) 420, note, 97 L. T. N. S. 466, note—210.
- v. Whittaker** (1899) 16 Times L. R. (Eng.) 108, 64 J. P. 54—58.
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- Hartnett v. Thomas J. Steen Co.** (1915) — N. Y. —, 110 N. E. 170—269.
- Hartshorne v. Coppice Colliery Co.** (1912) 106 L. T. N. S. (Eng.) 609, 5 B. W. C. C. 358, [1912] W. C. Rep. 255—184.
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- v. Texas & P. R. Co.** 92 C. C. A. 237, 166 Fed. 385—328.
- Harwood, Re**, [1901] 2 K. B. (Eng.) 304, 70 L. J. K. B. N. S. 746, 84 L. T. N. S. 857—183.
- v. Wyken Colliery Co.** [1913] 2 K. B. (Eng.) 158, 82 L. J. K. B. N. S. 414, 108 L. T. N. S. 283, 29 Times L. R. 290, 57 Sol. Jo. 300, [1913] W. C. & Ins. Rep. 317, [1913] W. N. 53, 6 B. W. C. C. 225—31, 137, 294.
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- Havey v. Erie R. Co.** (1915) — N. J. L. —, 95 Atl. 124—246, 248, 252, 253.

- Haward v. Rowsell** [1914] W. C. & Ins. Rep. (Eng.) 314, 7 B. W. C. C. 552—70, 87, 91.
- Hawkes v. Broadwalk Shoe Co.** 207 Mass. 117, 44 L.R.A.(N.S.) 1123, 92 N. E. 1017—320.
- v. Coles** (1910) 3 B. W. C. C. (Eng.) 163—74, 140, 388.
- Hawkins v. Bleakley** (1914) 220 Fed. 378—401, 411, 413, 427.
- v. Powells Tillery Steam Coal Co.** [1911] 1 K. B. (Eng.) 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178—33, 39, 294, 301.
- Hayden v. Dick** (1902) 5 Sc. Sess. Cas. 5th series, 150, 40 Scot. L. R. 95, 10 Scot. L. T. 380—119.
- Hayes v. Thompson** [1913] W. C. & Ins. Rep. (Eng.) 161, 6 B. W. C. C. 130—97.
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- Hay's Wharf v. Brown** (1909) 3 B. W. C. C. (Eng.) 84—141, 387, 389.
- Hayward v. Westleigh Colliery Co.** [1915] A. C. (Eng.) 540, 84 L. J. K. B. N. S. 61, 112 L. T. N. S. 1001, 31 Times L. R. 215, 8 B. W. C. C. 278, [1915] W. N. 67, 59 Sol. Jo. 269, rev'g 7 B. W. C. C. 53, [1914] W. C. & Ins. Rep. 21—71, 84, 88.
- Healy v. Galloway**, 41 Ir. Law Times, 5—92, 93.
- v. Macgregor** (1900) 2 Sc. Sess. Cas. 5th series, 634, 37 Scot. L. R. 454, 7 Scot. L. T. 402—204.
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- v. Shaw** (1915) — Wis. —, 154 N. W. 631—243.
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- Hendrickson v. Public Service R. Co.** (1915) — N. J. L. —, 94 Atl. 402—271.
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- Henshaw v. Fielding** (1914) 7 B. W. C. C. (Eng.) 650—171.
- Herbert v. Fox** [1915] 2 K. B. (Eng.) 81, 84 L. J. K. B. N. S. 670, [1914] W. C. & Ins. Rep. 154, [1914] W. N. 44, 59 Sol. Jo. 249, 8 B. W. C. C. 94—55.
- Herd v. Summers** (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 870—96.
- Herkey v. Agar Mfg. Co.** (1915) 90 Misc. 457, 153 N. Y. Supp. 369—222, 411.
- Herrick v. Minneapolis & St. L. R. Co.** 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413—433, 434.
- Herrick's Case** (1914) 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554—250, 252, 266.
- Hewitt v. Hudson's Bay Co.** (1910) 20 Manitoba L. Rep. 126, 15 West. L. Rep. (Can.) 372—116.
- v. Stanley Bros.** [1913] W. C. & Ins. Rep. (Eng.) 495, 109 L. T. N. S. 384, 6 B. W. C. C. 501—71.
- v. The Duchess** [1910] 1 K. B. (Eng.) 772, 79 L. J. K. B. N. S. 867, 102 L. T. N. S. 204, 26 Times L. R. 300, 54 Sol. Jo. 325, 3 B. W. C. C. 239—67.
- Hewlett v. Hepburn** (1899) 16 Times L. R. (Eng.) 56—158.
- Hichens v. Magnus Metal Co.** 35 N. J. L. J. 327—278, 288.
- Hicks v. Maxton** (1907; C. C.) 124 L. T. Jo. (Eng.) 135, 1 B. W. C. C. 150—104, 445.
- Higgins v. Campbell** [1904] 1 K. B. 328, affirmed in [1905] A. C. 230—287.
- v. Central New England & W. R. Co.** 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534—434.
- v. Poulson** (1911) 5 B. W. C. C. (Eng.) 66—80.
- v. Poulson** [1912] 2 K. B. (Eng.) 292, 81 L. J. K. B. N. S. 690, 106 L. T. N. S. 518, 28 Times L. R. 323, [1912] W. N. 90, [1912] W. C. Rep. 244, 5 B. W. C. C. 340—163, 164.
- Higgs v. Unicume** [1913] 1 K. B. (Eng.) 595, 82 L. J. K. B. N. S. 369, 108 L. T. N. S. 169, [1913] W. N. 36, [1913] W. C. & Ins. Rep. 263, 6 B. W. C. C. 205—148, 171.
- Hill v. Begg** [1908] 2 K. B. (Eng.) 802, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 24 Times L. R. 711, 52 Sol. Jo. 581—120, 364, 365.
- v. Granby Consol. Mines** (1908) 12 B. C. 118—75, 77, 355.
- v. Ocean Coal Co.** (1909) 3 B. W. C. C. (Eng.) 29—139, 170.
- Hillestad v. Industrial Ins. Commission** (1914) 80 Wash. 426, 141 Pac. 913, 6 N. C. C. A. 763—216, 246, 260.



- Hills v. Blair** (1914) 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409—**232, 235, 237, 241, 266, 320, 331, 332.**
- Hine, The v. Trevor**, 4 Wall. 555, 18 L. ed. 451—**439, 440.**
- Hirschkorn v. Fiege Desk Co.** (1915) — Mich. —, 150 N. W. 851—**256.**
- Hoare v. Arding** (1911) 5 B. W. C. C. (Eng.) 36—**90.**
- v. The Cecil Rhodes** (1911) 5 B. W. C. C. (Eng.) 49—**118.**
- v. Truman** (1902) 71 L. J. K. B. N. S. (Eng.) 380, 86 L. T. N. S. 417, 50 Week. Rep. 396, 66 J. P. 342, 4 W. C. C. 58—**202.**
- Hockley v. West London Timber & Joinery Co.** [1914] 3 K. B. (Eng.) 1013, 83 L. J. K. B. N. S. 1520, [1914] W. N. 330, 58 Sol. Jo. 705—**96, 97.**
- Hoddinott v. Newton** [1901] A. C. (Eng.) 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134—**197, 198.**
- v. Newton** [1899] 1 Q. B. (Eng.) 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299—**197, 198.**
- Hodgson v. Robins** [1914] W. C. & Ins. Rep. (Eng.) 65, [1914] W. N. 47, 7 B. W. C. C. 232—**86, 88.**
- v. West Stanley Colliery** [1910] A. C. (Eng.) 229, 79 L. J. K. B. N. S. 356, 102 L. T. N. S. 194, 26 Times L. R. 333, 54 Sol. Jo. 403, 3 B. W. C. C. 260, 47 Scot. L. R. 881—**123.**
- Hoenig v. Industrial Commission** (1915) 159 Wis. 646, 150 N. W. 996, 8 N. C. C. A. 192 (reported in full herein, p. 339)—**233, 241, 266, 347.**
- Hoey v. Superior Laundry Co.** (1913) 85 N. J. L. 119, 88 Atl. 823—**271.**
- Hoff v. Hackett**, 148 Wis. 32, 134 N. W. 132—**369.**
- Holmes v. Great Northern R. Co.** [1900] 2 Q. B. (Eng.) 409, 83 L. T. N. S. 44, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 16 Times L. R. 412—**61, 329, 332.**
- Holness v. Mackay** [1899] 2 Q. B. (Eng.) 319, 68 L. J. K. B. N. S. 724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 L. T. N. S. 831, 15 Times L. R. 351—**58, 60, 331.**
- Holt v. Yates** (1909) 3 B. W. C. C. (Eng.) 75—**137.**
- Homer v. Gough** [1912] 2 K. B. (Eng.) 303, 81 L. J. K. B. N. S. 261, 105 L. T. N. S. 732, 5 B. W. C. C. 51—**100.**
- Honor v. Painter** (1911) 4 B. W. C. C. (Eng.) 188—**39.**
- Hood v. Maryland Casualty Co.** 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329—**280.**
- Hopkins v. Michigan Sugar Co.** (1915) — Mich. —, 150 N. W. 325 (reported in full herein, p. 310)—**232, 233, 314.**
- Hopley v. Pool** (1915) 8 B. W. C. C. (Eng.) 512—**68.**
- Hopwood v. Olive** (1910) 102 L. T. N. S. (Eng.) 790, 3 B. W. C. C. 357—**78.**
- Horn v. Lords Comrs. of Admiralty** [1911] 1 K. B. (Eng.) 24, 80 L. J. K. B. N. S. 278, 103 L. T. N. S. 614, 27 Times L. R. 84, 4 B. W. C. C. 1—**94.**
- Horsfall v. Pacific Mut. L. Ins. Co.** 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028—**298.**
- v. The Jura** [1913] W. C. & Ins. Rep. (Eng.) 183, 6 B. W. C. C. 213—**63, 351.**
- Horsman v. Glasgow Nav. Co.** (1909) 3 B. W. C. C. (Eng.) 27—**149.**
- Hosegood v. Wilson** [1911] 1 K. B. (Eng.) 30, 80 L. J. K. B. N. S. 519, 103 L. T. N. S. 616, 27 Times L. R. 88, 4 B. W. C. C. 30—**166, 174.**
- Hoskins v. Lancaster** (1910) 26 Times L. R. (Eng.) 612, 3 B. W. C. C. 476—**61, 329, 332.**
- Hotel Bond Co.'s Appeal** (1915) 89 Conn. 143, 93 Atl. 245—**215, 248, 250, 252, 254, 266, 413-415, 439, 440.**
- Houghton v. Sutton Health & L. G. Collieries Co.** [1901] 1 K. B. (Eng.) 93, 83 L. T. N. S. 472, 70 L. J. Q. B. N. S. 61, 65 J. P. 134, 49 Week. Rep. 196, 17 Times L. R. 54—**158.**
- Houlder Line v. Griffin** [1905] A. C. (Eng.) 220, 7 W. C. C. 87—**205, 206, 210.**
- House of Lords of Plumb v. Cobden Flour Mills Co.** [1914] A. C. (Eng.) 62, 83 L. J. K. B. N. S. 197 [1914] W. C. & Ins. Rep. 48, 109 L. T. N. S. 759, [1913] W. N. 367, 51 Scot. L. R. 861, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495—**52.**
- Housley v. Hadfields** (1915) 8 B. W. C. C. (Eng.) 497—**148.**
- Hovis v. Cudahy Ref. Co.** (1915) 95 Kan. 505, 148 Pac. 626—**413.**
- Howard v. Driver** (1903) 5 W. C. C. (Eng.) 153—**103, 362.**
- v. Illinois C. R. Co.** See Employers' Liability Cases.
- Howard's Case** (1914) 218 Mass. 404, 105 N. E. 636, 5 N. C. C. A. 449—**239.**
- Howards v. Wharton** [1913] W. C. & Ins. Rep. (Eng.) 504, 6 B. W. C. C. 614—**139.**
- Howarth v. Knowles** [1913] 3 K. B. (Eng.) 675, 82 L. J. K. B. N. S. 1325, 109 L. T. N. S. 278, 29 Times L. R. 667, 57 Sol. Jo. 471, [1913] W. N. 237, 6 B. W. C. C. 596—**94.**
- v. Samuelson** (1906) 104 L. T. N. S. (Eng.) 907, 4 B. W. C. C. 287—**178.**
- Howe v. Fernhill Collieries** [1912] W. C. & Ins. Rep. (Eng.) 408, 107 L. T. N. S. 508, 5 B. W. C. C. 629—**68, 293.**
- Howell v. Blackwell** [1912] W. C. Rep. (Eng.) 186, 5 B. W. C. C. 293—**173.**
- v. Bradford** (1911) 104 L. T. N. S. (Eng.) 433—**135.**
- Howells v. Vivian** (1901) 18 Times L. R. (Eng.) 36, 50 Week. Rep. 163, 85 L. T. N. S. 529, 4 W. C. C. 106—**121, 122.**

- Hubball v. Everitt (1900) 16 Times L. R. 168, 5 W. C. C. 145—183.
- Huckle v. London County Council (1910) 27 Times L. R. (Eng.) 112, 4 B. W. C. C. 113—73.
- Huggins v. Guest [1913] W. C. & Ins. Rep. (Eng.) 191, 6 B. W. C. C. 80—40.
- Hughes v. Clover [1909] 2 K. B. (Eng.) 798, 78 L. J. K. B. N. S. 1057, 101 L. T. N. S. 475, 25 Times L. R. 760, 53 Sol. Jo. 763, affirmed in [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885—34, 293.
- v. Coed Talon Colliery Co. [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. N. S. 539, 100 L. T. N. S. 555—84, 88.
- v. Postlethwaite (1910) 4 B. W. C. C. (Eng.) 105—118.
- v. Summerlee & M. Iron & Steel Co. (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 784—134.
- v. Thistle Chemical Co. [1906-07] S. C. (Scot.) 607—181.
- v. Vothey Quarry Co. (1908; C. C.) 125 L. T. Jo. (Eng.) 471, 1 B. W. C. C. 416—190.
- Hugo v. Larkins (1910) 3 B. W. C. C. (Eng.) 228—33, 294.
- Hulehan v. Green Bay, W. & St. P. R. Co. 68 Wis. 520, 32 N. W. 529—[9] 473.
- Hulley v. Moosbrugger (1915) — N. J. L. —, 93 Atl. 79—232, 240.
- Humber Towing Co. v. Barclay (1911) 5 B. W. C. C. (Eng.) 142—138.
- Humphreys v. London Electric Lighting Co. (1911) 4 B. W. C. C. (Eng.) 275—142.
- Hunnewell's Case (1915) 220 Mass. 351, 107 N. E. 934—231, 257, 259, 264, 271.
- Hunt v. Grantham Co-op. Soc. (1904; C. C.) 112 L. T. N. S. (Eng.) 364, 4 W. C. C. 67—206.
- v. Highley Min. Co. [1914] W. C. & Ins. Rep. (Eng.) 402, 7 B. W. C. C. 716—88, 89.
- v. Lowell Gaslight Co. 8 Allen, 169, 85 Am. Dec. 697—280.
- Hunter v. Baird, 7 F. (Scot.) 304, cited in 2 Mews, Eng. Cas. Law Dig. (1898-07) Supp. 1570—150, 373.
- v. Colfax Consol. Coal Co. (1915) — Iowa, —, 154 N. W. 1037—220, 413, 414, 422, 424-427.
- Hurle, Re, (1914) 217 Mass. 223, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527 (reported in full herein, p. 279)—227, 229, 288, 290.
- Husband v. Campbell (1903) 5 Sc. Sess. Cas. 5th series, 1146, 40 Scot. L. R. 822, 11 Scot. L. T. 243—170.
- Huscroft v. Bennett (1914) 110 L. T. N. S. (Eng.) 494, [1914] W. C. & Ins. Rep. 9, 58 Sol. Jo. 284, 7 B. W. C. C. 41—44.
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- Huyett v. Pennsylvania R. Co. (1914) 86 N. J. L. 683, 92 Atl. 58—261, 412.
- Huzik v. Erie R. Co. 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732, affirmed in 86 N. J. L. 695, 92 Atl. 1087—253.
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## I

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- Ing v. Higgs (1914) 110 L. T. N. S. (Eng.) 442, [1914] W. C. & Ins. Rep. 86, 7 B. W. C. C. 65—86.
- International Harvester Co. v. Industrial Commission (1914) 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822—256, 266, 267, 269, 341.
- Interstate Teleph. & Teleg. Co. v. Public Service Electric Co. (1914) 86 N. J. L. 26, 90 Atl. 1062, 5 N. C. C. A. 524—226, 361.
- Irons v. Davis [1899] 2 Q. B. (Eng.) 330, 68 L. J. Q. B. N. S. 673, 80 L. T. N. S. 673, 47 Week. Rep. 616—143.
- Isaacson v. New Grand (Clapham Junction) [1903] 1 K. B. (Eng.) 539, 72 L. J. K. B. N. S. 227, 88 L. T. N. S. 291, 19 Times L. R. 150—82.
- Ismay v. Williamson [1908] A. C. (Eng.) 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, 42 Ir. Law Times, 213, 1 B. W. C. C. 232—30, 32, 34, 38, 43, 229, 280, 291, 293.
- Ivenhoe Gold Corp. v. Symonds (1907) 4 Austr. C. L. R. 642—81.
- Ives v. South Buffalo R. Co. (1911) 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, 1 N. C. C. A. 517, Ann. Cas. 1912B, 156—395, 398, 403, 409, 413, 416, 423, 427.
- Ivey v. Ivey [1912] 2 K. B. (Eng.) 118, 81 L. J. K. B. N. S. 819, 106 L. T. N. S. 485, 5 B. W. C. C. 279—162, 163.

## J

- Jackson v. Denton Colliery Co. [1914] W. C. & Ins. Rep. (Eng.) 91, 110 L. T. N. S. 559, 7 B. W. C. C. 92—53, 78.
- v. Erie R. Co. (1914) 86 N. J. L. 550, 91 Atl. 1035, 6 N. C. C. A. 944—250, 267.
- v. Hunslet Engine Co. (1915) 84 L. J. K. B. N. S. (Eng.) 1361—144.
- v. Rodger (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76 (1900) 37 Scot. L. R. 390, 2 Sc. Sess. Cas. 5th series, 533, 7 Scot. L. T. 363—210, 211.



- Jackson v. Roger** (1900) 2 Sc. Sess. Cas. 5th series, 533, 37 Scot. L. R. 390, 7 Scot. L. T. 363—204, 210, 211.
- v. Scotstoun Estate Co.** [1911] S. C. 564, 48 Scot. L. R. 440, 4 B. W. C. C. 381—191.
- v. Vickers** [1912] W. C. Rep. (Eng.) 274, 5 B. W. C. C. 432—85, 88.
- Jacowicz v. Delaware, L. & W. R. Co.** (1915) — N. J. —, 92 Atl. 946—225, 361.
- James v. Mordey** (1913) 109 L. T. N. S. (Eng.) 377, 6 B. W. C. C. 680—137, 142.
- v. Ocean Coal Co.** [1904] 2 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483—144.
- James A. Banister Co. v. Kriger** (1913) — N. J. L. —, 89 Atl. 923—262—264.
- v. Kriger** (1913) 84 N. J. L. C. 680—1027—262—264.
- Jamieson v. Clark** (1909) 46 Scot. L. R. 73, [1909] S. C. 132, 2 B. W. C. C. 228—106, 114.
- v. Fife Coal Co.** (1903) 5 Sc. Sess. Cas. 5th series (Scot.) 958—144.
- Janes's Case** (1914) 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552—252, 266.
- Jefferson Fertilizer Co. v. Rich**, 182 Ala. 633, 62 So. 40—279.
- Jeffrey Mfg. Co. v. Blagg** (1914) 90 Ohio St. 376, 108 N. E. 465—408, 410, 413, 423, 459.
- v. Blagg** (1914) 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570—408, 413, 423, 459.
- Jendrus v. Detroit Steel Products Co.** 178 Mich. 265, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864 (reported in full herein, p. 381)—244, 259, 356, 387.
- Jenkins v. Standard Colliery Co.** (1911) 105 L. T. N. S. (Eng.) 730, 28 Times L. R. 7, 5 B. W. C. C. 71—67, 68, 293.
- Jenkinson v. Harrison** (1911) 4 B. W. C. C. (Eng.) 194—56.
- Jensen v. Southern P. Co.** (1915) 215 N. Y. 514, 109 N. E. 600 (reported in full herein, p. 403)—217, 255, 416, 419, 428, 462—464.
- Jensen Case.** See **Jensen v. Southern P. Co.**
- Jesson v. Bath** (1902; C. C.) 113 L. T. Jo. (Eng.) 206, 4 W. C. C. 9—58, 62.
- Jessop v. Maclay** (1911) 5 B. W. C. C. (Eng.) 139—181.
- Jette v. Grand Trunk Co.** (1911) Rap. Jud. Quebec 40 C. S. 204—78, 357.
- Jibb v. Chadwick** [1915] 2 K. B. (Eng.) 84, 31 Times L. R. 185, [1915] W. N. 52, 8 B. W. C. C. 152—49.
- Jillson v. Ross** (1915) — R. I. —, 94 Atl. 717—243, 267, 269.
- Jinks, Re** (1914; K. B. Div.) 137 L. T. Jo. (Eng.) 320—99.
- Jobson v. Cory** (1911) 4 B. W. C. C. (Eng.) 284—135.
- John v. Albion Coal Co.** (1901) 18 Times L. R. (Eng.) 27, 65 J. P. 788—77, 357.
- Johnson v. Adshead** (1900; C. C.) 109 L. T. Jo. (Eng.) 40, 2 W. C. C. 158—188.
- v. London General Omnibus Co.** (1905; C. C.) 7 W. C. C. (Eng.) 83—201, 207.
- v. Marshall** [1906] A. C. (Eng.) 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630, 8 W. C. C. 10—75, 76, 79, 355—357.
- v. Nelson** (1914) 128 Minn. 158, 150 N. W. 620—221, 410, 444.
- v. Newton Fire Extinguisher Co.** [1913] 2 K. B. (Eng.) 111, 82 L. J. K. B. N. S. 541, 108 L. T. N. S. 360, [1913] W. N. 37, [1913] W. C. & Ins. Rep. 352, 6 B. W. C. C. 202—181.
- v. Oceanic Steam Nav. Co.** [1912] W. C. Rep. (Eng.) 162, 5 B. W. C. C. 322—181, 189.
- v. St. Paul & W. Coal Co.** 131 Wis. 627, 111 S. W. 722—[9] 473.
- v. Torrington** (1909) 3 B. W. C. C. (Eng.) 68—40.
- v. Wootton** (1911) 27 Times L. R. (Eng.) 487, 4 B. W. C. C. 258—85.
- Johnson's Case** (1914) 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843—227, 229, 242, 266, 288, 290.
- Johnston v. Mew, L. & Co.** (1907) 98 L. T. N. S. (Eng.) 517, 24 Times L. R. 175, 1 B. W. C. C. 133—180, 181.
- v. Monasterevan General Store Co.** [1909] 2 I. R. 108, 42 Ir. Law Times, 268, 2 B. W. C. C. 183—97, 364.
- Johnstone v. Cochran** (1904) 6 Sc. Sess. Cas. 5th series, 854, 41 Scot. L. R. 644, 12 Scot. L. T. 175—172.
- v. Spencer** [1908] S. C. 1015, 45 Scot. L. R. 802, 1 B. W. C. C. 302—163.
- Jones v. Anderson** (1914) 84 L. J. P. C. N. S. (Eng.) 47, 112 L. T. N. S. 225, 31 Times L. R. 76, [1914] W. N. 432, 59 Sol. Jo. 159, [1915] W. C. & Ins. Rep. 151, 8 B. W. C. C. 2—32, 172, 179.
- v. Davies** [1914] 3 K. B. (Eng.) 549, [1914] W. N. 280, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1531, 7 B. W. C. C. 488—182.
- v. Great Central R. Co.** (1901) 4 W. C. C. (Eng.) 23—80, 182, 184.
- v. London & N. W. R. Co.** (1901) 4 W. C. C. (Eng.) 140—142.
- v. London & S. W. R. Co.** (1901) 3 W. C. C. (Eng.) 46—77, 357.
- v. New Brynmally Colliery Co.** [1912] W. C. Rep. (Eng.) 281, 5 B. W. C. C. 375, 106 L. T. N. S. 524—108.
- v. Ocean Coal Co.** [1899] 2 Q. B. (Eng.) 124, 68 L. J. Q. B. N. S. 731, 47 Week. Rep. 484, 80 L. T. N. S. 582, 15 Times L. R. 339—157, 158.
- v. Penwyllt Dinas Silica Brick Co.** [1913] W. C. & Ins. Rep. (Eng.) 394, 6 B. W. C. C. 492—115.
- v. The Alice & Eliza** (1910) 3 B. W. C. C. (Eng.) 495—117.

- Jones v. Tirdonkin Colliery Co.** (1911) 5 B. W. C. C. (Eng.) 3—171, 172.
- v. Walker** (1899; C. C.) 105 L. T. Jo. (Eng.) 579, 1 W. C. C. 142—149.
- v. Winder** [1914] W. C. & Ins. Rep. (Eng.) 38, 7 B. W. C. C. 204—181.
- Jucker v. Chicago & N. W. R. Co.** 52 Wis. 150, 8 N. W. 862—[17] 481.
- Judd v. Metropolitan Asylums Board** [1912] W. C. Rep. (Eng.) 220, 5 B. W. C. C. 420—92.
- Jury v. The Atlanta** [1912] 3 K. B. (Eng.) 366, 81 L. J. K. B. N. S. 1182, 107 L. T. N. S. 366, 28 Times L. R. 562, 56 Sol. Jo. 703, [1912] W. N. 218, 5 B. W. C. C. 681—152.
- K**
- Kane v. Merry** [1911] S. C. 533, 48 Scot. L. R. 430, 4 B. W. C. C. 379—55.
- Karemaker v. The Corsican** (1911) 4 B. W. C. C. (Eng.) 295—67.
- Karny v. Northwestern Malleable Iron Co.** (1915) 160 Wis. 316, 151 N. W. 786—219, 220.
- Kavanagh v. Caledonian R. Co.** (1903) 5 Sc. Sess. Cas. 5th series, 1128, 40 Scot. L. R. 812, 11 Scot. L. T. 281—202.
- Keane v. Nash** (1902; C. C.) 114 L. T. Jo. (Eng.) 102, 5 W. C. C. 53—83.
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- v. St. George** [1914] W. C. & Ins. Rep. (Eng.) 17, 7 B. W. C. C. 85—**46**.
- v. Stag Line** (1912) 107 L. T. N. S. (Eng.) 509, 56 Sol. Jo. 720, [1912] W. C. Rep. 398, 5 B. W. C. C. 660—**69**.
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- Littleford v. Connell** (1909) 3 B. W. C. C. (Eng.) 1—**136**.
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- v. Sugg** [1900] 1 Q. B. (Eng.) 486, 69 L. J. Q. B. N. S. 190, 81 L. T. N. S. 768, 16 Times L. R. 65—**35, 294**.
- Lochgelly Iron & Coal Co. v. Sinclair** [1909] S. C. (Scot.) 922—**166, 187**.
- Logue v. Fullerton** (1901) 3 Sc. Sess. Cas. 5th series, 1006, 38 Scot. L. R. 738, 9 Scot. L. T. 152—**76, 356**.
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- Lord v. Turner** (1902; C. C.) 114 L. T. Jo. (Eng.) 133, 5 W. C. C. 87—**196, 208**.
- Lord Halsbury & Powell v. Main Colliery Co.** [1900] A. C. (Eng.) 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100—**84**.
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- Lowe v. Myers** [1906] 2 K. B. (Eng.) 265, 75 L. J. K. B. N. S. 651, 95 L. T. N. S. 35, 22 Times L. R. 614—85, 86.
- v. Pearson** [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124—56, 76, [22] 486.
- Lowestoft Corp. v. Aldridge** (1912) 5 B. W. C. C. (Eng.) 329—182.
- Lowry v. Sheffield Coal Co.** (1907) 24 Times L. R. (Eng.) 142, 1 B. W. C. C. 1—58, 329.
- Lowth v. Ibbotson** [1899] 1 Q. B. (Eng.) 1003, 80 L. T. N. S. 341, 68 L. J. Q. B. N. S. 465, 47 Week. Rep. 506, 15 Times L. R. 264—194.
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- Luckwell v. Auchen Steam Shipping Co.** [1913] W. C. & Ins. Rep. (Eng.) 167, 108 L. T. N. S. 52, 12 Asp. Mar. L. Cas. 286, 6 B. W. C. C. 51—96.
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- Lydman v. De Haas** (1915) — Mich. —, 151 N. W. 718, 8 N. C. C. A. 649—220.
- Lynch v. Baird** (1904) 6 Sc. Sess. Cas. 5th Series, 271, 41 Scot. L. R. 214, 11 Scot. L. T. 597—77, 357.
- v. Lansdowne**, 48 Ir. Law Times, 89—92.
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- v. Knowles** [1901] A. C. (Eng.) 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156—155.
- M**
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- Macandrew v. Gilhooley** [1911] S. C. 448, 48 Scot. L. R. 511, 4 B. W. C. C. 370—73.
- McArdle v. Swansea Harbour Trust** (1915) 8 B. W. C. C. (Eng.) 489—34.
- McArthur v. McQueen** (1901) 3 Sc. Sess. Cas. 5th Series, 1010, 38 Scot. L. R. 732, 9 Scot. L. T. 114—76, 356.
- McAvan v. Boase Spinning Co.** (1901) 3 Sc. Sess. Cas. 5th series, 1048, 38 Scot. L. R. 772, 9 Scot. L. T. 152—161.
- McCabe v. Jopling** [1904] 1 K. B. (Eng.) 222, 73 L. J. K. B. N. S. 129, 89 L. T. N. S. 624, 20 Times L. R. 119, 52 Week. Rep. 358, 68 J. P. 121—198, 212.
- v. North** [1913] W. C. & Ins. Rep. (Eng.) 522, 109 L. T. N. S. 369, 6 B. W. C. C. 504—49.
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- v. Stapleton-Bretherton** (1911) 4 B. W. C. C. (Eng.) 281—184.
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- McCord v. The City of Liverpool** [1914] 3 K. B. (Eng.) 1037, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767—106.
- McCormick v. Kelliher** (1912) 7 D. L. R. (B. C.) 732—82.
- v. Kelliher Lumber Co.** (1912) 17 B. C. 422, 6 B. W. C. C. 947—81.
- v. Kelliher Lumber Co.** (1913; B. C.) 7 B. W. C. C. 1025—45, 81.
- McCoy v. Michigan Screw Co.** 180 Mich. 454, 147 N. W. 572, 5 N. C. C. A. 455 (reported in full herein, p. 323)—235, 241, 326.
- McCracken v. Missouri Valley Bridge & Iron Co.** (1915) — Kan. —, 150 Pac. 832—263.
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- McCue v. Barclay** (1902) 4 Sc. Sess. Cas. 5th series, 909, 39 Scot. L. R. 690, 10 Scot. L. T. 116—156, 157.
- McDaid v. Steel** [1911] S. C. 859, 48 Scot. L. R. 765, 4 B. W. C. C. 412—55.
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- M'Diarmid v. Ogilvy Bros.** [1913] W. C. & Ins. Rep. 537, 50 Scot. L. R. 883, 6 B. W. C. C. 878—56.
- McDonald v. Browns**, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213—279.
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- v. Price** (1914) 30 Times L. R. (Eng.) 248—**180.**
- v. Prince** [1914] 3 K. B. (Eng.) 1047, 30 Times L. R. 654, 137 L. T. Jo. 316, 58 Sol. Jo. 721, [1914] W. N. 330, 7 B. W. C. C. 755—**172, 190.**

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- Meier v. Dublin** [1912] 2 I. R. 129, [1913] W. C. & Ins. Rep. 30, 46 Ir. Law Times, 233, 6 B. W. C. C. 441—96.
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- Miller v. North British Locomotive Co.** [1909] S. C. 698, 46 Scot. L. R. 755, 2 B. W. C. C. 80—68, 181.
- v. Public Service R. Co.** (1913) 84 N. J. L. 174, 85 Atl. 1030—253.
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- v. Sovereign Camp, W. W.** 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126—369.
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- Milwaukee Coke & Gas. Co. v. Industrial Commission** (1915) 160 Wis. 247, 151 N. W. 245—233, 254, 267.
- Milwaukee Western Fuel Co. v. Industrial Commission**, 159 Wis. 635, 150 N. W. 998—222, 232, 244, 276, 341, 356.
- Miner v. Franklin County Teleph. Co.** 83 Vt. 311, 26 L.R.A.(N.S.) 1195, 75 Atl. 653—[20] 484.
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- v. The Saxon** (1912) 5 B. W. C. C. (Eng.) 623—69.
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- v. Manchester Liners** [1910] A. C. (Eng.) 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527—65, 66, 67, 237, 319.
- v. Naval Colliery Co.** [1912] 1 K. B. (Eng.) 28, 81 L. J. K. B. N. S. 149, 105 L. T. N. S. 838, 5 B. W. C. C. 87, [1912] W. C. Rep. 81—90.
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- Moreton v. Reeve** [1907] 2 K. B. (Eng.) 401, 76 L. J. K. B. N. S. 850, 97 L. T. N. S. 63, 9 W. C. C. 72—208.
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- v. Tydvil Engineering & Ship Repairing Co.** (1908) 98 L. T. N. S. (Eng.) 762, 24 Times L. R. 403, 1 B. W. C. C. 78—210.
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- v. Lambeth Borough Council** (1905) 22 Times L. R. (Eng.) 22—59, 320.
- v. Northern Employer's Mut. Indemnity Co.** [1902] 2 K. B. (Eng.) 165, 71 L. J. K. B. N. S. 733, 86 L. T. N. S. 748, 66 J. P. 644, 50 Week. Rep. 545, 18 Times L. R. 635, 4 W. C. C. 38—99, 100.
- v. Rowbotham** (1915) 8 B. W. C. C. (Eng.) 157—51.
- v. Turford** [1913] W. C. & Ins. Rep. (Eng.) 502, 6 B. W. C. C. 606—39.
- Morrison v. Clyde Navigation** [1909] S. C. 59, 46 Scot. L. R. 40—46.
- Morter v. Great Eastern R. Co.** (1908; C. C.) 126 L. T. Jo. (Eng.) 171, 2 B. W. C. C. 480—94, 128.
- Mortimer v. Secretan** [1909] 2 K. B. (Eng.) 77, 78 L. J. K. B. N. S. 521, 100 L. T. N. S. 721—189.
- v. Wisker** [1914] 3 K. B. (Eng.) 699, 30 Times L. R. 592, [1914] W. N. 281, 137 L. T. Jo. 211, 83 L. J. K. B. N. S. 1245, 111 L. T. N. S. 732, 7 B. W. C. C. 494—104.
- Morton v. Woodward** [1902] 2 K. B. (Eng.) 276, 71 L. J. K. B. N. S. 736, 66 J. P. 660, 51 Week. Rep. 54, 86 L. T. N. S. 878, 4 W. C. C. 143—166.
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- Mountain v. Parr** [1899] 1 Q. B. (Eng.) 805, 68 L. J. Q. B. N. S. 447, 47 Week. Rep. 353, 80 L. T. N. S. 342, 15 Times L. R. 262—177.
- Mowlem v. Dunne** [1912] 2 K. B. (Eng.) 136, 81 L. J. K. B. N. S. 777, 106 L. T. N. S. 611, [1912] W. N. 98, [1912] W. C. Rep. 298, 5 B. W. C. C. 382—188.
- Moynes v. Dixon** (1905) 7 Sc. Sess. Cas. 5th series (Scot.) 386—126.
- Mulholland v. Whitehaven Colliery Co.** [1910] 2 K. B. (Eng.) 278, 79 L. J. K. B. N. S. 987, 26 Times L. R. 462, 102 L. T. N. S. 663, 3 B. W. C. C. 317—172, 177.
- Mullen v. Stewart** [1908] S. C. (Scot.) 991, 1 B. W. C. C. 204—47, 57.
- Muller v. Batavier Line** (1909; C. C.) 126 L. T. Jo. (Eng.) 96, 2 B. W. C. C. 495—174.
- Mulligan v. Dick** (1904) 6 Sc. Sess. Cas. 5th series, 126, 41 Scot. L. R. 77, 11 Scot. L. T. 433—101, 361.
- Mulrooney v. Todd** [1909] 1 K. B. (Eng.) 165, 78 L. J. K. B. N. S. 145, 100 L. T. N. S. 99, 73 J. P. 73, 25 Times L. R. 103, 53 Sol. Jo. 99 [1908] W. N. 242—97.
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- Murphy v. Berwick** (1909) 43 Ir. Law Times, 126—65, 310.
- v. Cooney** [1914] 2 I. R. 76 [1914] W. C. & Ins. Rep. 44, 48 Ir. Law Times, 13, 7 B. W. C. C. 962—63, 351.
- v. Enniscorthy Guardians** [1908] 2 I. R. 609, 42 Ir. Law Times, 246, 2 B. W. C. C. 291—114.
- v. O'Donnell** (1906) 54 Week. Rep. (Eng.) 149, 8 W. C. C. 70—209.
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- Murray, Re**, Ops. Sol. Dept. Commerce & Labor, p. 201—298.
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- v. Denholm** [1911] S. C. 1087, 48 Scot. L. R. 896, 5 B. W. C. C. 496—39, 64, 309.
- v. Gourlay** [1908] S. C. 769, 45 Scot. L. R. 577—134.
- v. North British R. Co.** (1904) 6 Sc. Sess. Cas. 5th series, 540, 41 Scot. L. R. 383, 11 Scot. L. T. 746—101, 361.
- Mutter v. Thomson** [1913] W. C. & Ins. Rep. 241, [1913] S. C. 619, 50 Scot. L. R. 447, 6 B. W. C. C. 424—133, 292, 303.
- Muzik v. Erie R. Co.** (1914) 85 N. J. L. 129, 89 Atl. 248, 4 N. C. C. A. 732, affirmed in 86 N. J. L. 695, 92 Atl. 1087—242, 250.

## N

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- v. The Rangitira** [1914] 3 K. B. (Eng.) 978, 83 L. J. K. B. N. S. 1496, [1914] W. N. 291, 111 L. T. N. S. 704, 58 Sol. Jo. 705, 7 B. W. C. C. 590—63, 351.
- Nashville, C. & St. L. R. Co. v. Alabama**, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28—452.



- National Teleph. Co. v. Smith** [1909] S. C. 1363, 46 Scot. L. R. 988, 2 B. W. C. C. 417—173.
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- Neale v. Electric & Ordinance Accessories Co.** [1906] 2 K. B. (Eng.) 558, 75 L. J. K. B. N. S. 974, 95 L. T. N. S. 592, 22 Times L. R. 732—82.
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- v. Belfast Corp.** (1908) 42 Ir. Law Times 223, 1 B. W. C. C. 158—58.
- v. Kerr** (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Scot. L. R. 645, 9 Scot. L. T. 83—156, 159.
- v. Summerlee Iron Co.** [1910] S. C. 360, 47 Scot. L. R. 344—166.
- Nelson's Case** (1914) 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694—251, 370.
- Nettleingham v. Powell** [1913] 3 K. B. (Eng.) 209, 82 L. J. K. B. N. S. 911, 108 L. T. N. S. 912, 29 Times L. R. 578, 57 Sol. Jo. 593, [1913] W. N. 182, [1913] W. C. & Ins. Rep. 424, 6 B. W. C. C. 479, aff'g the divisional court [1913] 1 K. B. (Eng.) 113, [1912] W. N. 278, 82 L. J. K. B. N. S. 54, 108 L. T. N. S. 219, 29 Times L. R. 88, 6 B. W. C. C. 262—103, 362.
- Neville v. Kelly Bros.** (1907) 13 B. C. 125—30.
- New Amsterdam Casualty Co. v. Olcott** (1915) 165 App. Div. 603, 150 N. Y. Supp. 772—265.
- Newark Paving Co. v. Klotz** (1914) 85 N. J. L. 432, 91 Atl. 91, affirmed in (1914) 86 N. J. L. 690, 92 Atl. 1086—226, 251, 316, 361.
- Newcomb v. Albertson** (1913) 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783—230, 292.
- Newhouse v. Johnson** (1911) 5 B. W. C. C. (Eng.) 137—145.
- Newman v. Newman** (1915) — App. Div. —, 155 N. Y. Supp. 665—234, 314.
- New Monckton Collieries v. Keeling** [1911] A. C. (Eng.) 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, [1911] W. N. 176, 4 B. W. C. C. 332—122, 124, 370.
- v. Toone** [1913] W. C. & Ins. Rep. (Eng.) 425, 109 L. T. N. S. 374, 57 Sol. Jo. 753, 6 B. W. C. C. 660—171.
- Newson v. Burstall** (1915) 84 L. J. K. B. N. S. (Eng.) 535, 112 L. T. N. S. 792, 50 L. J. 54, [1915] W. C. & Ins. Rep. 16, 59 Sol. Jo. 204, 8 B. W. C. C. 21—45.
- New York, C. & St. L. R. Co. v. Niebel**, 131 C. C. A. 248, 214 Fed. 952—459.
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- New York Shipbuilding Co. v. Buchanan** (1913) 84 N. J. L. 543, 87 Atl. 86—263.
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- Nicholson v. Piper** [1907] A. C. (Eng.) 215, 76 L. J. K. B. N. S. 856, 97 L. T. N. S. 119, 23 Times L. R. 620—167, 169.
- v. Thomas** (1910) 3 B. W. C. C. (Eng.) 452—183.
- Nickerson's Case** (1914) 218 Mass. 158, 105 N. W. 604, 5 N. C. C. A. 645—243, 244, 266, 355—357.
- Niddrie & B. Coal Co. v. McKay** (1903) 5 Sc. Sess. Cas. 5th series, 1121, 40 Scot. L. R. 798, 11 Scot. L. T. 275—161, 190.
- Nimms v. Fisher** [1906-07] S. C. (Scot.) 890—144.
- Nisbet v. Rayne** [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 368—38, 64, 240, 306, 307, 309.
- Nitram Co. v. Court of Common Pleas** (1913) 84 N. J. L. 243, 86 Atl. 435—257.
- Noble State Bank v. Haskell** (1911) 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487—408, 416.
- Noden v. Galloways** [1912] 1 K. B. (Eng.) 46 [1911] W. N. 192, 81 L. J. K. B. N. S. 28, 105 L. T. N. S. 567, 28 Times L. R. 5, 55 Sol. Jo. 838, [1911] W. C. Rep. 63, 5 B. W. C. C. 7—68.
- Nolan v. Porter** (1909) 2 B. W. C. C. (Eng.) 106—60, 331.
- Nole v. Wadworth** [1913] W. C. & Ins. Rep. (Eng.) 160, 6 B. W. C. C. 129—52.
- Norman v. Walder** [1904] 2 K. B. (Eng.) 27, 73 L. J. K. B. N. S. 461, 68 J. P. 401, 52 Week. Rep. 402, 90 L. T. N. S. 531, 20 Times L. R. 427, 6 W. C. C. 124—145, 378.
- North American Life & Acci. Ins. Co. v. Burroughs**, 69 Pa. 43, 8 Am. Rep. 212—298.
- North Carolina R. Co. v. Zachary**, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159—457.

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- Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978—433.
- v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160—453.
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- v. Industrial Commission (1915) 160 Wis. 633, 152 N. W. 416—236.
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## O

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- v. Star Line [1908] S. C. (Scot.) 1258—67.
- v. Star Line (1908) 45 Scot. L. R. 935, 1 B. W. C. C. 177—63, 351.
- O'Connell v. Simms Magneto Co. (1913) 85 N. J. L. 64, 89 Atl. 922, 4 N. C. C. A. 590—264.
- O'Donnell v. Clare County Council (1913) W. C. & Ins. Rep. 273, 47 Ir. Law Times 41, 6 B. W. C. C. 457—119, 364.
- O'Donovan v. Cameron [1901] 2 I. R. 633, 34 Ir. Law Times, 169—136.
- Ogden v. Aspinwall, 220 Mass. 100, 107 N. E. 448—336.
- v. Saunders, 12 Wheat. 213, 6 L. ed. 606—459.
- v. South Kirky, F. & H. Collieries [1913] W. C. & Ins. Rep. (Eng.) 463, 6 B. W. C. C. 573—139.
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- O'Hara v. Cadzow Coal Co. (1903) 5 Se. Sess. Cas. (Scot.) 5th series, 439—77, 357.
- v. Hayes (1910) 41 Ir. Law Times, 71, 3 B. W. C. C. 586—33, 294.
- O'Keefe v. Lovatt (1902) 18 Times L. R. (Eng.) 57, 4 W. C. C. 109—135, 163.
- Okrzsezs v. Lehigh Valley R. Co. (1915) — App. Div. —, 155 N. Y. Supp. 919—464.
- Old Dominion S. S. Co. v. Gilmore. See Hamilton, The.
- Oldenberg v. Industrial Commission (1915) 159 Wis. 333, 150 N. W. 444—260.
- Oliver v. Nautilus Steam Shipping Co. [1903] 2 K. B. (Eng.) 639, 72 L. J. K. B. N. S. 857, 89 L. T. N. S. 318, 19 Times L. R. 697, 52 Week. Rep. 200, 9 Asp. Mar. L. Cas. 436—27, 102, 361.
- Olson v. The Dorset (1913) 6 B. W. C. C. (Eng.) 658—68, 292.
- O'Neil v. West Side Storage Warehouse Co. (1915) — App. Div. —, 155 N. Y. Supp. 912—258.
- O'Neill v. Anglo-American Oil Co. (1909) 2 B. W. C. C. (Eng.) 434—189.
- v. Bansha Co-op. Agri. & Dairy Soc. [1910] 2 I. R. 324, 44 Ir. Law Times, 52—136.
- v. Brown & Co. [1913] S. C. 653, [1913] W. C. & Ins. Rep. 235, 50 Scot. L. R. 450, 6 B. W. C. C. 428—140, 388.
- v. Motherwell [1906-07] S. C. (Scot.) 1076—93.
- v. Ropner (1908) 42 Ir. Law Times, 3, 2 B. W. C. C. 334—140, 389.
- Opinion of Justices (1911) 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557—308, 401, 413, 414, 424, 431.
- O'Reilly v. New York & N. E. R. Co. 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 19 Atl. 244—430.
- Orrell Colliery Co. v. Schofield [1909] A. C. (Eng.) 433, 78 L. J. K. B. N. S. 677, 100 L. T. N. S. 786, 25 Times L. R. 569, 53 Sol. Jo. 518, aff'g [1908] W. N. 243, 25 Times L. R. 106, 53 Sol. Jo. 117—124.
- Osborn v. Vickers [1900] 2 Q. B. (Eng.) 91, 69 L. J. Q. B. N. S. 606, 82 L. T. N. S. 491, 16 Times L. R. 333—160.
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- v. Tralee & D. R. Co. [1913] 2 I. R. 133, 47 Ir. Law Times, 141, [1913] W. C. & Ins. Rep. 391, 6 B. W. C. C. 913—143.
- Osmond v. Campbell [1905] 2 K. B. (Eng.) 852, 75 L. J. K. B. N. S. 1, 54 Week. Rep. 117, 93 L. T. N. S. 724, 22 Times L. R. 4—134, 136.
- O'Toole v. Brandram-Henderson (1915) 48 N. S. 293—194.
- Owen v. Clark (1901; C. C.) 3 W. C. C. (Eng.) 170—213.
- Owens v. Campbell [1904] 2 K. B. (Eng.) 60, 73 L. J. K. B. N. S. 634, 68 J. P. 410, 52 Week. Rep. 481, 90 L. T. N. S. 811, 20 Times L. R. 459, 6 W. C. C. 54—206.

## P

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- v. Pillsbury (1915) — Cal. —, 151 Pac. 658—269.
- Pacific Steam Nav. Co. v. Pugh (1907) 23 Times L. R. (Eng.) 622, 9 W. C. C. 39—212.
- Paddington v. Stack (1909) 2 B. W. C. C. (Eng.) 402—140.
- Paddington Borough Council v. Stack (1909) 2 B. W. C. C. (Eng.) 402—358.
- Page v. Burtwell [1908] 2 K. B. (Eng.) 758, 77 L. J. K. B. N. S. 1061, 99 L. T. N. S. 542, 125 L. T. Jo. 336, 1 B. W. C. C. 267—101, 103, 361.



- Panagotis v. The Pontiac** [1912] 1 K. B. (Eng.) [1911] W. N. 221, 28 Times L. R. 63, 56 Sol. Jo. 71—112.
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- Park v. Coltness Iron Co.** (1913) 50 Scot. L. R. 926, 2 Scot. L. T. 232, 6 B. W. C. C. 892—191.
- Parker v. Dixon** (1902) 4 Sc. Sess. Cas. 5th series, 1147, 39 Scot. L. R. 663, 10 Scot. L. T. 153—143.
- v. Hambrook** [1912] W. N. (Eng.) 205, 107 L. T. N. S. 249, 56 Sol. Jo. 750, [1912] W. C. Rep. 369, 5 B. W. C. C. 608, Ann. Cas. 1913C, 1—55, [13] 477.
- v. Pout** (1911) 105 L. T. N. S. (Eng.) 493—44.
- v. The Black Rock** [1914] 2 K. B. (Eng.) 39, 83 L. J. K. B. N. S. 421, 110 L. T. N. S. 520, 30 Times L. R. 271, 58 Sol. Jo. 285, [1914] W. N. 43, [1914] W. C. & Ins. Rep. 117, 7 B. W. C. C. 152, sustained by the House of Lords, [1915] A. C. (Eng.) 725, 31 Times L. R. 432, [1915] W. N. 204—67.
- Parro v. New York, S. & W. R. Co.** (1913) 85 N. J. L. 155, 88 Atl. 825, 4 N. C. C. A. 680—272.
- Parry v. Rhymney Iron & Coal Co.** (1912) 5 B. W. C. C. (Eng.) 632—162.
- Paterson v. Lockhart** (1906) 7 Sc. Sess. Cas. 5th series, 954, 42 Scot. L. R. 24—119, 120.
- v. Moore** [1910] S. C. 29, 47 Scot. L. R. 30, 3 B. W. C. C. 541—378, 144.
- Paton v. Dixon** [1913] W. C. & Ins. Rep. 517, 50 Scot. L. R. 866, 6 B. W. C. C. 882, [1913] S. C. 1120—36, 290.
- Patry v. Chicago & W. I. R. Co.** 265 Ill. 310, 106 N. E. 843—459.
- Pattinson v. Stevenson** (1900; C. C.) 109 L. T. Jo. (Eng.) 106, 2 W. C. C. 156—173.
- Pattison v. White** (1904) 6 W. C. C. (Eng.) 61, 20 Times L. R. 775—193, 196.
- Payne v. Clifton** (1910) 3 B. W. C. C. (Eng.) 439—179.
- v. Fortescue** [1912] 3 K. B. (Eng.) 346, 81 L. J. K. B. N. S. 1191, 107 L. T. N. S. 136, 57 Sol. Jo. 81, [1912] W. N. 216, 5 B. W. C. C. 634—80.
- Peacock v. Niddric & B. Coal Co.** (1902) 4 Sc. Sess. Cas. 5th series, 443, 39 Scot. L. R. 317, 9 Scot. L. T. 379—157.
- Pearce v. London & S. W. R. Co.** (1899) 2 W. C. C. 152—317.
- v. London & S. W. R. Co.** [1900] 2 Q. B. (Eng.) 100, 69 L. J. Q. B. N. S. 683, 48 Week. Rep. 599, 82 L. T. N. S. 473, 16 Times L. R. 336—97.
- Pears v. Gibbons** [1913] W. C. & Ins. Rep. (Eng.) 469, 6 B. W. C. C. 722—109, 115.
- Pedersen v. Delaware, L. & W. R. Co.** 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779—451, 456.
- Peel v. Laurence** [1912] W. C. Rep. (Eng.) 141, 106 L. T. N. S. 482, 28 Times L. R. 318, 5 B. W. C. C. 274—42.
- Peers v. Astley & T. Collieries Co.** (1901; C. C.) 3 W. C. C. (Eng.) 185—156.
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- Peggie v. Wemyss Coal Co.** [1909-10] S. C. 93, 47 Scot. L. R. 149—86.
- Peill v. Payne** (1915) 8 B. W. C. C. (Eng.) 111—190.
- Pendar v. H. & B. American Mach. Co.** 35 B. I. 321, 87 Atl. 1, 4 N. C. C. A. 600 (reported in full herein, p. 428)—439, 443.
- Penman v. Smith's Dry Docks Co.** (1915) 8 B. W. C. C. (Eng.) 487—141.
- Penn v. Spiers & Pond** [1908] 1 K. B. (Eng.) 766, 77 L. J. K. B. N. S. 542, 98 L. T. N. S. 541, 24 Times L. R. 354, 52 Sol. Jo. 280, 1 B. W. C. C. 401, 14 Ann. Cas. 335—159, 374.
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- Percival v. Garner** [1900] 2 Q. B. (Eng.) 406, 69 L. J. Q. B. N. S. 824, 64 J. P. 500, 16 Times L. R. 396—213.
- Perry v. Anglo-American Decorating Co.** (1910) 3 B. W. C. C. (Eng.) 310—48.
- v. Baker** (1901; C. C.) 3 W. C. C. (Eng.) 29—31, 32, 303.
- v. Clements** (1901) 17 Times L. R. (Eng.) 525, 49 Week. Rep. 669—84.
- v. Ocean Coal Co.** [1912] W. C. Rep. (Eng.) 212, 106 L. T. N. S. 713, 5 B. W. C. C. 421—40.
- v. Wright** [1908] 1 K. B. (Eng.) 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186, 1 B. W. C. C. 351—149-151, 153-155, 373.
- Peters v. The Argol** (1912) 5 B. W. C. C. (Eng.) 414—181.
- Pethick, Re** [1915] 1 Ch. (Eng.) 26, 84 L. J. Ch. N. S. 285, 112 L. T. N. S. 212, [1915] W. C. & Ins. Rep. 5, [1915] H. B. R. 59, [1914] W. N. 403, 59 Sol. Jo. 74—99.
- Petrie, Re** (1915) 215 N. Y. 335, 109 N. E. 549—215, 258.
- Petschett v. Preis** (1915) 31 Times L. R. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44—31, 36, 86, 290.

- Philadelphia, B. & W. R. Co. v. Schubert**, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892—456, 460.
- Phillips v. Vickers** [1912] 1 K. B. (Eng.) 16, 81 L. J. K. B. N. S. 123, 105 L. T. N. S. 564, 5 B. W. C. C. 23, [1911] W. N. 193, [1912] W. C. Rep. 71—184.
- v. Williams** (1911) 4 B. W. C. C. (Eng.) 143—47.
- Piatt v. Swift & Co.** (1915) 188 Mo. App. 584, 176 S. W. 434—272.
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- Pigeon's Case** (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516—234, 245, 267, 268, 270, 271, 384.
- Pimm v. Clement Talbot** [1914] W. C. & Ins. Rep. (Eng.) 350, 7 B. W. C. C. 565—87, 88.
- Pimms v. Pearson** (1909; C. C.) 126 L. T. Jo. (Eng.) 301, 2 B. W. C. C. 489—139.
- Pinel v. Rapid R. System** (1915) — Mich. —, 150 N. W. 897—251.
- Plant v. Wright** [1905] 1 K. B. (Eng.) 353, 74 L. J. K. B. N. S. 331, 53 Week. Rep. 358, 92 L. T. N. S. 720, 21 Times L. R. 217—198.
- Plass v. Central New England R. Co.** (1915) — App. Div. —, 155 N. Y. Supp. 854—230, 266, 291.
- Platt v. Swift & Co.** (1915) 188 Mo. App. 584, 176 S. W. 434—221.
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- Plumley v. Ewart & Son** (1915) 8 B. W. C. C. (Eng.) 464—85.
- Poccardi v. Public Service Commission** (1915) — W. Va. —, 84 S. E. 242, 8 N. C. C. A. 1065 (reported in full herein, p. 299)—228, 232, 242, 266, 267, 269, 270, 303.
- Pollard v. Goole & H. Steam Towing Co.** (1910) 3 B. W. C. C. (Eng.) 360—113, 114.
- Polled v. Great Northern R. Co.** (1912) 5 B. C. C. (Eng.) 620, former appeal, 5 B. W. C. C. 115—122, 124, 370.
- Pomfret v. Lancashire & Y. R. Co.** [1903] 2 K. B. (Eng.) 718, 72 L. J. K. B. N. S. 729, 52 Week. Rep. 66, 89 L. T. N. S. 176, 19 Times L. R. 649—67, 68.
- Pomphrey v. Southwark Press** [1901] 1 K. B. (Eng.) 86, 83 L. T. N. S. 468, 70 L. J. Q. B. N. S. 48, 65 J. P. 148, 17 Times L. R. 53—143, 158.
- Pool v. Chicago, M. & St. P. R. Co.** 53 Wis. 657, 11 N. W. 15—328.
- Pope v. Heywood Bros. & W. Co.** (1915) 221 Mass. 143, 108 N. E. 1059—219.
- v. Hill's Plymouth Co.** (1910) 102 L. T. N. S. (Eng.) 632, 3 B. W. C. C. 339, aff'd in (1912; H. L.) 105 L. T. N. S. (Eng.) 675, [1912] W. C. Rep. 15, 5 B. W. C. C. 175—55.
- Popple v. Frodingham Iron & Steel Co.** [1912] 2 K. B. (Eng.) 141, 81 L. J. K. B. N. S. 769, 106 L. T. N. S. 703, [1912] W. C. Rep. 231, 5 B. W. C. C. 394—185, 186.
- Porter v. Hopkins** (1914) — Ohio St. —, 109 N. E. 629—423, 428.
- v. Whitbread** [1914] W. C. & Ins. Rep. (Eng.) 59, 7 B. W. C. C. 205—149.
- Portland v. Central (Unemployed) Body for London** [1908] W. N. (Eng.) 242, 25 Times L. R. 102—113.
- Possner v. Smith Metal Bed Co.** (1915) — App. Div. —, 155 N. Y. Supp. 912—258.
- Potter v. Welch** [1914] 3 K. B. (Eng.) 1020, 30 Times L. R. 644, [1914] W. N. 106, 137 L. T. Jo. 290, 83 L. J. K. B. N. S. 1852, 7 B. W. C. C. 738—82, 89.
- Potts v. Guildford** (1914) 7 B. W. C. C. (Eng.) 675—148.
- Poulton v. Kelsall** [1912] 2 K. B. (Eng.) 131, 81 L. J. K. B. N. S. 774, 106 L. T. N. S. 522, 28 Times L. R. 329, [1912] W. C. Rep. 295, [1912] W. N. 98, 5 B. W. C. C. 318—60, 331.
- Powell v. Brown** [1899] 1 Q. B. (Eng.) 157, 68 L. J. Q. B. N. S. 151, 47 Week. Rep. 145, 79 L. T. N. S. 631, 15 Times L. R. 65—193, 194.
- v. Bryndu Colliery Co.** (1911) 5 B. W. C. C. (Eng.) 124—55.
- v. Crow's Nest Pass Coal Co.** (1915) 23 D. L. R. (B. C.) 57—78, 179, 356.
- v. Lanarkshire Steel Co.** (1904) 6 Sc. Sess. Cas. (Scot.) 5th series, 1039—55, 77, 357.
- v. Main Colliery Co.** [1900] 2 Q. B. (Eng.) 145, 69 L. J. Q. B. N. S. 542, 64 J. P. 323, 48 Week. Rep. 534, 82 L. T. N. S. 340, 16 Times L. R. 282—84, 85.
- v. Main Colliery Co.** [1900] A. C. (Eng.) 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100—84, 85.
- v. Pennsylvania**, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992—402.
- Powers v. Calcasieu Sugar Co.** 48 La. Ann. 483, 19 So. 455—329.
- v. Smith** (1910) 3 B. W. C. C. (Eng.) 470—39.
- Powley v. Vivian & Co.** (1915) 169 App. Div. 170, 154 N. Y. Supp. 426—227, 247, 266.



**Praties v. Broxburn Oil Co.** [1906-07] S. C. (Scot.) 581—**75, 78, 355, 357.**

**Pressey v. Wirth**, 3 Allen, 191—336.

**Price v. Burnyeat** (1907) 2 B. W. C. C. (Eng.) 337—**145.**

**v. Clover Leaf Coal Min. Co.** (1914) 188 Ill. App. 27—**219.**

**v. Marsden** [1899] 1 Q. B. (Eng.) 493, 68 L. J. Q. B. N. S. 307, 47 Week. Rep. 274, 80 L. T. N. S. 15, 15 Times L. R. 184—**149, 151, 373.**

**v. Tredegar Iron & Coal Co.** [1914] W. N. (Eng.) 257, 30 Times L. R. 583, 58 Sol. Jo. 632, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 295, 111 L. T. N. S. 688, 7 B. W. C. C. 387—**49.**

**v. Westminster Brymbo Coal & Coke Co.** [1915] 2 K. B. (Eng.) 128, 84 L. J. K. B. N. S. 746, 112 L. T. N. S. 905, 31 Times L. R. 219, [1915] W. N. 69, 59 Sol. Jo. 301, 8 B. W. C. C. 257—**189.**

**Priestley v. Port of London Authority** [1913] 2 K. B. (Eng.) 115, 82 L. J. K. B. N. S. 353, 108 L. T. N. S. 277, 29 Times L. R. 252, 57 Sol. Jo. 282, 6 B. W. C. C. 105—**151.**

**Prigg v. Pennsylvania**, 16 Pet. 539, 10 L. ed. 1060—**454.**

**Pritchard v. Torkington** [1914] W. C. & Ins. Rep. (Eng.) 271, 7 B. W. C. C. 719, 58 Sol. Jo. 739—**41, 51.**

**Proctor v. Cumisky** (1904) 6 Sc. Sess. Cas. 5th series, 832, 41 Scot. L. R. 636, 12 Scot. L. T. 172—**191.**

**v. Robinson** [1911] 1 K. B. (Eng.) 1004, 80 L. J. K. B. N. S. 641, 3 B. W. C. C. 41—**146, 380.**

**v. The Serbino** (1915) 31 Times L. R. (Eng.) 524—**70.**

**Provost v. St. Gabriel Lumber Co.** (1910) 12 Quebec Pr. Rep. 285—**117.**

**Przykopski v. Citizens Coal Min. Co.** (1915) — Ill. —, 110 N. E. 336—**410.**

**Puget Sound Traction Light & P. Co. v. Schleif** (1915) 135 C. C. A. 616, 220 Fed. 48—**219, 223.**

**Pugh v. Dudley** [1914] W. C. & Ins. Rep. (Eng.) 265, 7 B. W. C. C. 528—**68.**

**Pumpherstons Oil Co. v. Cavaney** (1903) 5 Sc. Sess. Cas. 5th series, 963, 40 Scot. L. R. 724, 11 Scot. L. T. 171—**166.**

**Purse v. Hayward** (1908; C. C.) 125 L. T. Jo. (Eng.) 10, 1 B. W. C. C. 216—**32, 297.**

**Purves v. Sterne** (1900) 2 Sc. Sess. Cas. 5th series, 887, 37 Scot. L. R. 696—**211.**

**Puza v. C. Hennecke Co.** (1914) 158 Wis. 482, 149 N. W. 223—**219.**

**Pyrce v. Penrikyber Nav. Colliery Co.** [1902] 1 K. B. (Eng.) 221, 85 L. T. N. S. 477, 18 Times L. R. 54, 71 L. J. K. B. N. S. 192, 66 J. P. 198, 50 Week. Rep. 197—**125.**

## Q

**Quinlan v. Barber Asphalt Paving Co.** (1913) 84 N. J. L. 510, 87 Atl. 127—**253.**

**Quinn v. Brown** (1906) 8 Sc. Sess. Cas. 5th series (Scot.) 855—**81.**

**v. Flynn** (1910) 44 Ir. L. Times 183, 3 B. W. C. C. 594—**191.**

**v. McCallum** [1909] S. C. 227, 46 Scot. L. R. 141—**171.**

## R

**Radcliffe v. Pacific Steam Nav. Co.** [1910] 1 K. B. (Eng.) 685, 79 L. J. K. B. N. S. 429, 102 L. T. N. S. 206, 26 Times L. R. 319, 54 So. Jo. 404, 3 B. W. C. C. 185—**164, 379.**

**Raine v. Jobson** [1901] A. C. (Eng.) 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, 3 W. C. C. 135—**121, 203-205, 210, 211.**

**Rakiec v. Delaware, L. & W. R. Co.** (1913) — N. J. L. —, 88 Atl. 953—**258.**

**Ralph v. Mitchell** [1913] W. C. & Ins. Rep. (Eng.) 501, 6 B. W. C. C. 678—**92.**

**Ramsay v. Mackie** (1904) 7 Sc. Sess. Cas. 5th series (Scot.) 106—**212.**

**Rankine v. Alloa Coal Co.** (1904) 6 Sc. Sess. Cas. 5th series, 375, 41 Scot. L. R. 306, 11 Scot. L. T. 670—**90.**

**v. Fife Coal Co.** (1915) 52 Scot. L. R. 361, 8 B. W. C. C. 401—**143.**

**Raphael v. Brandy** [1911] A. C. (Eng.) 413, 80 L. J. K. B. N. S. 1067, 105 L. T. N. S. 116, 27 Times L. R. 497, 55 Sol. Jo. 579, 4 B. W. C. C. 307—**152, 374.**

**Rayman v. Fields** (1910) 102 L. T. N. S. (Eng.) 154, 26 Times L. R. 274, 3 B. W. C. C. 119—**67, 180.**

**Rayner v. Sligh Furniture Co.** (1914) 180 Mich. 168, 146 N. W. 665, 4 N. C. C. A. 851 (reported in full herein, p. [22] 486)—**237, 266, 341, [20] 484.**

**Reardon v. Philadelphia & R. R. Co.** (1913) 85 N. J. L. 90, 88 Atl. 970, 4 N. C. C. A. 776—**252, 253.**

**Reck v. Whittlesberger** (1914) 181 Mich. 463, 148 N. W. 247—**242, 267, 268.**

**Reddy v. Broderick** [1901] 2 I. R. (Ir.) 328—**198, 199.**

**Redfield v. Michigan Workmen's Compensation Mut. Ins. Co.** (1915) 183 Mich. 633, 150 N. W. 362, 8 N. C. C. A. 889—**266.**

**Reed v. Great Western R. Co.** [1909] A. C. 31, 2 B. W. C. C. 109, 99 L. T. N. S. 781, 78 L. J. K. B. N. S. 31, 25 Times L. R. 36, 46 Scot. L. R. 700, 53 Sol. Jo. 31—**46, [21] 485, [22] 486.**

**v. Great Western R. Co.** [1908] W. N. (Eng.) 212—**46, [21] 485, [22] 486.**

**v. Smith** (1910) 3 B. W. C. C. (Eng.) 223—**113.**

**v. Wymeric** (1914) 7 B. W. C. C. (Eng.) 421—**182.**

- Reeks v. Kynoch** (1901) 18 Times L. R. (Eng.) 34, 50 Week. Rep. 113, 2 N. C. C. A. 877—76, 356.
- Rees v. Consolidated Anthracite Collieries** (1912) 5 B. W. C. C. (Eng.) 403, [1912] W. C. Rep. 205—184.
- v. Penrikyber Nav. Colliery Co.** [1903] 1 K. B. (Eng.) 259, 72 L. J. K. B. N. S. 85, 67 J. P. 231, 51 Week. Rep. 247, 87 L. T. N. S. 661, 19 Times L. R. 113, 1 L. G. R. 173—125.
- v. Powell Duffryn Steam Coal Co.** (1900) 64 J. P. (Eng.) 164—75, 355.
- v. Richard** (1899) 1 W. C. C. (Eng.) 118—183.
- v. Thomas** [1899] 1 Q. B. (Eng.) 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301—56.
- Reeve v. Northern P. R. Co.** 82 Wash. 268, L.R.A.1915C, 37, 144 Pac. 63, 8 N. C. C. A. 167—459.
- Refuge Assur. Co. v. Millar** (1911) 49 Scot. L. R. 67—90.
- Reg. v. Clarke** [1906] 2 I. R. (Ir.) 135—124, 370.
- Reid v. Anchor Line** (1903) 5 Sc. Sess. Cas. 5th series, 435, 40 Scot. L. R. 352, 10 Scot. L. T. 591—204.
- v. Colorado**, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506—406, 453.
- v. Fleming** (1901) 3 Sc. Sess. Cas. 5th series, 1000, 38 Scot. L. R. 720, 9 Scot. L. T. 113—213.
- v. Leitch Collieries** (1912) 7 B. W. C. C. (Alberta) 1017—118.
- Reimers v. Proctor Pub. Co.** (1913) 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738—231, 239, 271.
- Reithel, Re** (1915) —Mass.—, 109 N. E. 951 (reported in full herein, p. 304)—231, 240, 309.
- Rendall v. Hill's Dry Docks & Engineering Co.** [1909] 2 Q. B. (Eng.) 245, 69 L. J. Q. B. N. S. 554, 64 J. P. 451, 48 Week. Rep. 530, 82 L. T. N. S. 521, 16 Times L. R. 368—93.
- Rennie v. Reid** [1908] S. C. (Scot.) 1057, 45 Scot. L. R. 814, 1 B. W. C. C. 324—120, 364.
- Replogle v. Seattle School Dist.** (1915) 84 Wash. 581, 147 Pac. 196—219.
- Revie v. Cumming** [1911] S. C. 1032, 48 Scot. L. R. 831—55.
- Rex v. Crossley** (Ct. Crim. App.) [1909] 1 K. B. (Eng.) 411, 78 L. J. K. B. N. S. 299, 100 L. T. N. S. 463, 25 Times L. R. 225, 73 J. P. 119, 53 Sol. Jo. 214, 22 Cox, C. C. 40—181.
- v. Owen** [1902] 2 K. B. (Eng.) 436, 71 L. J. K. B. N. S. 770, 87 L. T. N. S. 298, 18 Times L. R. 701—190.
- v. Registrar of Bow County Ct.** (Div. Ct.) [1914] 3 K. B. (Eng.) 266, [1914] W. N. 223, 83 L. J. K. B. N. S. 1806, 111 L. T. N. S. 277—189.
- Rex v. Templer** [1912] 2 K. B. 444, 81 L. J. K. B. N. S. 805, [1912] W. C. Rep. 209, 5 B. W. C. C. 454, 106 L. T. N. S. 855, [1912] W. N. 135, 28 Times L. R. 410, 56 Sol. Jo. 501—147, 177, 178, 381.
- v. Templer** [1912] 1 K. B. (Eng.) 351, 81 L. J. K. B. N. S. 399, 105 L. T. N. S. 905, 28 Times L. R. 146, 132 L. T. Jo. 203, 5 B. W. C. C. 242—147, 177, 178, 381.
- v. Thetford County Ct. Registrar** (1915; Div. Ct.) [1915] 1 K. B. (Eng.) 224, 112 L. T. N. S. 413, 84 L. J. K. B. N. S. 291, [1915] W. C. & Ins. Rep. 136, [1914] W. N. 438, 8 B. W. C. C. 276—174.
- Reyners v. Makin** (1911) 4 B. W. C. C. (Eng.) 267—165.
- Reynolds v. Day**, 79 Wash. 499, 140 Pac. 681 (reported in full herein, p. 432)—443.
- Rheinwald v. Builders' Brick & Supply Co.** (1915) 168 App. Div. 425, 153 N. Y. Supp. 598—247.
- Rhodes v. Soothill Wood Colliery Co.** [1909] 1 K. B. (Eng.) 191, 78 L. J. K. B. N. S. 141, 100 L. T. N. S. 15, [1908] W. N. 252, 2 B. W. C. C. 377—163, 189.
- Richards v. Morris** [1915] 1 K. B. (Eng.) 221, 84 L. J. K. B. N. S. 621, 110 L. T. N. S. 496, [1914] W. C. & Ins. Rep. 116, 7 B. W. C. C. 130—52.
- v. Pitt** (1915) 84 L. J. K. B. N. S. (Eng.) 1417—115.
- Richardson v. Denton Colliery Co.** [1913] W. N. (Eng.) 238, [1913] W. C. & Ins. Rep. 554, 109 L. T. N. S. 370, 6 B. W. C. C. 629—55.
- v. The Avonmore** (1911) 5 B. W. C. C. (Eng.) 34—70.
- Riddle v. MacFadden**, 201 N. Y. 215, 94 N. E. 644—279.
- Rigby v. Cox** [1904] 1 K. B. (Eng.) 358, 73 L. J. K. B. N. S. 80, 68 J. P. 195, 52 Week. Rep. 195, 89 L. T. N. S. 717, 20 Times L. R. 136—179.
- v. Cox** [1904] 2 K. B. (Eng.) 208, 73 L. J. K. B. N. S. 690, 91 L. T. N. S. 72, 20 Times L. R. 461, 68 J. P. 385—182.
- Rigel, The** (1912; Adm.) 106 L. T. N. S. (Eng.) 648, [1912] W. N. 56, 28 Times L. R. 251, 12 Asp. Mar. L. Cas. 192, L. R. [1912] P. 99, 81 L. J. Prob. N. S. 86—103, 362.
- Riley v. Holland & Sons** [1911] 1 K. B. (Eng.) 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155—58, 329.
- Rimmer v. Premier Gas Engine Co.** (1907) 97 L. T. N. S. (Eng.) 226, 23 Times L. R. 610, 9 W. C. C. 56—196.
- Ringwood v. Kerr Bros.** (1914; Alberta) 7 B. W. C. C. 1056—96.
- Rintoul v. Dalmeny Oil Co.** [1908] S. C. (Scot.) 1025—123.



- Risdale v. The Kilmarnock** [1915] 1 K. B. (Eng.) 503, 84 L. J. K. B. N. S. 298, [1915] W. C. & Ins. Rep. 141, 112 L. T. N. S. 439, 31 Times L. R. 134, 59 Sol. Jo. 143, 8 B. W. C. C. 7—53.
- Ritchings v. Bryant**, 6 B. W. C. C. 183, [1913] W. C. & Ins. Rep. 171—120, 364, 365.
- Rixsom v. Pritchard** [1900] 1 Q. B. (Eng.) 800, 82 L. T. N. S. 186, 69 L. J. Q. B. N. S. 494, 16 Times L. R. 250—197.
- Roberts v. Benham** (1910) 3 B. W. C. C. (Eng.) 430—141.
- v. Charles Wolff Packing Co.** (1915) 95 Kan. 723, 149 Pac. 413—245, 261, 263, 377.
- v. Crystal Palace Foot Ball Club** (1909) 3 B. W. C. C. (Eng.) 51—88.
- v. Hall** (1912) 106 L. T. N. S. (Eng.) 769, [1912] W. C. Rep. 269, 5 B. W. C. C. 331—142, 147.
- v. Trollop** (1914) 7 B. W. C. C. (Eng.) 678—70.
- Robertson v. Allan Bros.** (1908) 77 L. J. K. B. N. S. (Eng.) 1072, 98 L. T. N. S. 821, 1 B. W. C. C. 172—66, 67, 78.
- v. Hall Bros. S. S. Co.** (1910) 3 B. W. C. C. (Eng.) 368—122.
- Robinson v. Anon** (1904; C. C.) 39 L. J. (Eng.) 164, 6 W. C. C. 117—135.
- Robson v. Blakey** [1912] S. C. 334, 49 Scot. L. R. 254, [1912] W. C. Rep. 86, 5 B. W. C. C. 536—43, 292.
- Rocca v. Jones** [1914] W. C. & Ins. Rep. (Eng.) 34, 7 B. W. C. C. 101, 6 N. C. C. A. 624—141, 179.
- Rockwell v. Lewis** (1915) 168 App. Div. 674, 154 N. Y. Supp. 893—258.
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- v. Metropolitan Borough** (1913) 7 B. W. C. C. (Eng.) 10—178.
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- Rosenqvist v. Bowring** [1908] 2 K. B. (Eng.) 108, 77 L. J. K. B. N. S. 545, 98 L. T. N. S. 773, 24 Times L. R. 504—160.
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- Ross v. Smith** (1909) So. Austr. L. R. 128—93.
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- Rounsaville v. Central R. Co.** (1915) — N. J. L. —, 94 Atl. 392, —445, 463.
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- Rowe v. Reynolds** (1900) 12 West. Austr. L. R. 75—77, 357.
- Rowland v. Wright** (1908) 77 L. J. K. B. N. S. (Eng.) 1071, 24 Times L. R. 852, [1909] 1 K. B. 963, 99 L. T. N. S. 758, 1 B. W. C. C. 192—41, 239, 307.
- Roylance v. Canadian P. R. Co.** (1908) 14 B. C. 20—144.
- Ruabon Coal Co. v. Thomas** (1909) 3 B. W. C. C. (Eng.) 32—141, 389.
- Rudge v. Young** (1914) 7 B. W. C. C. (Eng.) 406—181.
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- v. Keary** (1915) 52 Scot. L. R. 447, 8 B. W. C. C. 410—109.
- v. McCluskey** (1900) 2 Sc. Sess. Cas. 5th series, 1312, 37 Scot. L. R. 931, 8 Scot. L. T. 172—155.
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**Sadowski v. Thomas Furnace Co.** (1914) 157 Wis. 443, 146 N. W. 770—215, 275.  
**Said v. Welsford** (1910) 3 B. W. C. C. (Eng.) 233—188.  
**St. Louis, A. & T. R. Co. v. Welch**, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529—329.  
**St. Louis, I. M. & S. R. Co. v. Hesterly**, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703—456, 458.  
**St. Louis, S. F. & T. R. Co. v. Seale**, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1915C, 156—456.  
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**v. Wright** (1914) 110 L. T. N. S. (Eng.) 517, 30 Times L. R. 279, [1914] W. C. & Ins. Rep. 177, 7 B. W. C. C. 141—53.  
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**Sauntry v. Laird, Norton Co.** 100 Wis. 146, 75 N. W. 985—377.  
**Savage, Re** (1915) — Mass. —, 110 N. E. 283—241, 242, 267.  
**v. Jones**, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715—453, 454.  
**Scales v. West Norfolk Farmers' Manure & Chemical Co.** [1913] W. C. & Ins. Rep. 165, 6 B. W. C. C. 188—71, 302, 304.  
**Scalzo v. Columbia Macaroni Factory** (1912) 17 B. C. 201, 6 B. W. C. C. 945—46.  
**Schaeffer v. De Grottola** (1913) 85 N. J. L. 444, 89 Atl. 921, 4 N. C. C. A. 582—248.  
**Schneider v. Provident L. Ins. Co.** 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174—275.  
**Schofield v. Clough** [1913] 2 K. B. (Eng.) 103, 82 L. J. K. B. N. S. 447, 108 L. T. N. S. 532, 57 Sol. Jo. 243, [1913] W. C. & Ins. Rep. 292, 6 B. W. C. C. 66—188.  
**v. Clough** (1912) 5 B. W. C. C. (Eng.) 417, [1912] W. C. Rep. 301—188.  
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**Schweig v. Chicago, M. & St. P. R. Co.** 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135—459.  
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**v. Sanquhar & K. Collieries** (1915) 52 Scot. L. R. 391, 8 B. W. C. C. 405—185, 187.  
**Scullion v. Cadzow Coal Co.** [1914] S. C. 36, [1913] 2 Scot. L. T. 271, 51 Scot. L. R. 39, [1914] W. C. & Ins. Rep. 129, 7 B. W. C. C. 833—109.  
**Seaboard Air Line R. Co. v. Horton**, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834—457.  
**Second Employers' Liability Cases**, 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 33, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875—455, 457.  
**Segura, The v. Blampied** (1911) 4 B. W. C. C. (Eng.) 192—189.  
**Seller v. Boston Rural Dist. Council** (1914) 7 B. W. C. C. (Eng.) 99—45.  
**Senior v. Fountains** [1907] 2 K. B. (Eng.) 563, 76 L. J. K. B. N. S. 928, 97 L. T. N. S. 562, 23 Times L. R. 634—123.  
**Septimo's Case** (1914) 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906—255, 260, 266, 268, 272, 380.  
**Sexton v. Newark Dist. Teleg. Co.** 86 N. J. L. 701, 91 Atl. 1070—266, 316, 401, 412, 413, 415, 426, 431.  
**v. Newark Dist. Teleg. Co.** (1913) 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569—266, 316, 401, 412, 413, 415, 426, 431.  
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- Sharp v. Johnson & Co.** [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482—61, 329, 333.
- Sharpe v. Carswell** [1910] S. C. 391, 47 Scot. L. R. 335, 3 B. W. C. C. 552—117.
- Shaw v. Greenacres Spinning Co.** (1915) 8 B. W. C. C. (Eng.) 35—180.
- v. McFarlane** (1914) 52 Scot. L. R. 236, 8 B. W. C. C. 382—48, 64, 310.
- v. Wigan Coal & I. Co.** (1909) 3 B. W. C. C. (Eng.) 81—65, 310.
- Shea v. Drolenvaux** (1903) 88 L. T. N. S. (Eng.) 679, 19 Times L. R. 473, 5 W. C. C. 144—183.
- v. Drolenvaux** (1903) 6 W. C. C. (Eng.) 93—211.
- Shearer v. Miller** (1899) 2 Sc. Sess. Cas. 5th series, 114, 37 Scot. L. R. 80, 7 Scot. L. T. 231—88.
- Sheehy v. Great S. & W. R. Co.** [1913] W. C. & Ins. Rep. 404, 47 Ir. Law Times 161, 6 B. W. C. C. 927—28, 57.
- Sheerin v. F. & J. Clayton & Co.** [1910] 2 I. R. 105, 44 Ir. Law Times, 23, 3 B. W. C. C. 583—30, 37, 291.
- Sheldon v. Needham** (1914) 30 Times L. R. (Eng.) 590, 58 Sol. Jo. 652, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C. 471—42, 314.
- Sheridan v. P. J. Grol Constr. Co.** (1915) — App. Div. —, 155 N. Y. Supp. 859—218.
- Sherlock v. Alling**, 93 U. S. 99, 23 L. ed. 819—406, 460.
- Sherwood v. Johnson** [1913] W. C. & Ins. Rep. (Eng.) 57, 5 B. W. C. C. 686—68, 278.
- Shier v. Highbridge Urban Dist. Council** (1908; C. C.) 1 B. W. C. C. (Eng.) 347—40.
- Shinnick v. Clover Farms Co.** (1915) 169 App. Div. 236, 154 N. Y. Supp. 423—217, 223.
- Shipp v. Frodingham Iron & Steel Co.** [1913] 1 K. B. (Eng.) 577, 82 L. J. K. B. N. S. 273, 108 L. T. N. S. 55, 29 Times L. R. 215, 57 Sol. Jo. 264, [1913] W. N. 16, [1913] W. C. & Ins. Rep. 230, 6 B. W. C. C. 1, Ann. Cas. 1914C, 183—159.
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- Shore v. Hyrcania** (1911) 4 B. W. C. C. (Eng.) 207—184.
- Sidney v. Collins** (1910) 3 B. W. C. C. (Eng.) 433—85.
- Siemientkowski v. Berwind White Coal Min. Co.** (1914) — N. J. Eq. —, 92 Atl. 909—239.
- Silcock v. Golightly** [1915] 1 K. B. (Eng.) 748, 84 L. J. K. B. N. S. 499, 112 L. T. N. S. 800, 50 L. J. 55, [1914] W. C. & Ins. Rep. 164, [1915] W. N. 33, 8 B. W. C. C. 48—145.
- Silk v. Isle of Thanet Rural Dist. Council** (1913) 6 B. W. C. C. (Eng.) 539—180.
- Silvester v. Cude** (1899) 15 Times L. R. (Eng.) 434, 1 W. C. C. 120—197.
- Simmonds v. Stourbridge Brick & Fire Clay Co.** [1910] 2 K. B. (Eng.) 269, 79 L. J. K. B. N. S. 997, 102 L. T. N. S. 732, 26 Times L. R. 430—174.
- Simmons v. Faulds** (1901) 17 Times L. R. (Eng.) 352, 65 J. P. 371—118.
- v. Heath Laundry Co.** [1910] 1 K. B. (Eng.) 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 Times L. R. 326, 54 Sol. Jo. 392, 3 B. W. C. C. 200—116, 152, 374.
- v. White Bros.** [1899] 1 Q. B. (Eng.) 1005, 68 L. J. Q. B. N. S. 507, 47 Week. Rep. 512, 80 L. T. N. S. 344, 15 Times L. R. 263—121—123.
- Simpson v. Byrne** [1913] W. C. & Ins. Rep. (Eng.) 240, 47 Ir. Law Times, 27, 6 B. W. C. C. 455—138.
- v. Ebbw Vale Steel, Iron & Coal Co.** [1905] 1 K. B. (Eng.) 453, 74 L. J. K. B. N. S. 347, 53 Week. Rep. 390, 92 L. T. N. S. 282, 21 Times L. R. 209—115, 116.
- v. Shepard.** See Minnesota Rate Cases.
- Sinclair v. Carlton** [1914] 2 Scot. L. T. 105, [1914] S. C. 871, 51 Scot. L. R. 759, 7 B. W. C. C. 937—44.
- v. Maritime Pass. Assur. Co.** 3 El. & Bl. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342—278.
- Sinnes v. Daggett** (1914) 80 Wash. 673, 142 Pac. 5—259, 272.
- Sinnot v. Davenport**, 22 How. 227, 16 L. ed. 243—449.
- Skailes v. Blue Anchor Line** [1911] 1 K. B. (Eng.) 360, 80 L. J. K. B. N. S. 442, 103 L. T. N. S. 741, 27 Times L. R. 119, 55 Sol. Jo. 107, 4 B. W. C. C. 16, [1910] W. N. 267—121, 160.
- Skates v. Jones** [1910] 2 K. B. (Eng.) 903, 79 L. J. K. B. N. S. 1168, 103 L. T. N. S. 408, 26 Times L. R. 643, 3 B. W. C. C. 460—97.
- Skeggs v. Keen** (1899) 1 W. C. C. (Eng.) 35—82.
- v. Keen** (1899) 1 W. C. C. (Eng.) 119—183.
- Slade v. Taylor** [1915] W. C. & Ins. Rep. (Eng.) 53, 8 B. W. C. C. 65—42, 314.

- Slater v. Blyth Ship Bldg. & Dry Docks Co.** [1914] W. C. & Ins. Rep. (Eng.) 39, 7 B. W. C. C. 193—142.
- Slavin v. Train** (1911; Ct. Sess.) 49 Scot. L. R. 93, [1912] W. C. Rep. 167, 5 B. W. C. C. 525—82.
- Sligh v. Kirkwood**, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501—460.
- Smale v. Wrought Washer Mfg. Co.** (1915) 160 Wis. 331, 150 N. W. 803—225, 274, 360.
- Small v. McCormick** (1899) 1 Sc. Sess. Cas. 5th series, 883, 36 Scot. L. R. 700, 7 Scot. L. T. 35—149, 153, 373.
- Smith, Re** (1911) 17 West L. Rep. (Can.) 550—113.
- v. Abbey Park Steam Laundry Co.** (1909) 2 B. W. C. C. (Eng.) 142—79.
- v. Alabama**, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564—452.
- v. Buxton** (1915) 84 L. J. K. B. N. S. (Eng.) 697, 112 L. T. N. S. 893, [1915] W. C. & Ins. Rep. 126, 8 B. W. C. C. 196—120, 365.
- v. Coles** [1905] 2 K. B. (Eng.) 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754—192, 368.
- v. Cope** [1913] W. C. & Ins. Rep. (Eng.) 460, 6 B. W. C. C. 569—122.
- v. Davis** [1915] A. C. (Eng.) 528, 31 Times L. R. 356, [1915] W. N. 152, 59 Sol. Jo. 397—160.
- v. Fife Coal Co.** [1913] S. C. 663, [1913] W. C. & Ins. Rep. 343, 50 Scot. L. R. 455, 6 B. W. C. C. 435, [1914] A. C. (Eng.) 723, 83 L. J. P. C. N. S. 1359, 111 L. T. N. S. 477, [1914] S. C. 40, 51 Scot. L. R. 496, [1914] W. C. & Ins. Rep. 235, 30 Times L. R. 502, 58 Sol. Jo. 533, [1914] W. N. 196, 7 B. W. C. C. 253—54.
- v. Foster** [1913] W. C. & Ins. Rep. (Eng.) 420, 6 B. W. C. C. 499—179.
- v. General Motor Cab Co.** [1911] A. C. (Eng.) 188, 80 L. J. K. B. N. S. 839, 105 L. T. N. S. 113, 27 Times L. R. 370, 55 Sol. Jo. 439, 4 B. W. C. C. 249, 1 N. C. C. A. 576—117.
- v. Hardman** [1913] W. C. & Ins. Rep. (Eng.) 459, 6 B. W. C. C. 719—181.
- v. Horlock** [1913] W. C. & Ins. Rep. (Eng.) 441, 109 L. T. N. S. 196, 6 B. W. C. C. 638—117.
- v. Hughes** (1905; C. C.) 8 W. C. C. (Eng.) 115—165.
- v. Industrial Acci. Commission** (1915) 26 Cal. App. 560, 147 Pac. 601—270, 452, 463.
- v. Lancashire & Y. R. Co.** [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64—46, 180, [21] 485, [22] 486.
- Smith v. Morrison** (1911) 5 B. W. C. C. (Eng.) 161—44.
- v. Pearson** (1909; C. C.) 2 B. W. C. C. (Eng.) 468—86, 92.
- v. Petrie** [1913] W. C. & Ins. Rep. 378, 50 Scot. L. R. 749, 6 B. W. C. C. 833—167.
- v. Price** (1915) 168 App. Div. 421, 153 N. Y. Supp. 221—218.
- v. South Normanton Colliery Co.** [1903] 1 K. B. (Eng.) 204, 72 L. J. K. B. N. S. 76, 67 J. P. 381, 51 Week. Rep. 209, 88 L. T. N. S. 5, 19 Times L. R. 128—55.
- v. Standard Steam Fishing Co.** [1906] 2 K. B. (Eng.) 275, 75 L. J. K. B. N. S. 640, 54 Week. Rep. 582, 95 L. T. N. S. 42, 22 Times L. R. 578, 8 W. C. C. 76—205, 210.
- v. Stanton Ironworks Co. Collieries** [1913] W. C. Ins. Rep. (Eng.) 186, 6 B. W. C. C. 239—49.
- v. Travelers' Ins. Co.** 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607—278.
- v. Turner** (1901; C. C.) 3 W. C. C. (Eng.) 143—206.
- v. Western States Portland Cement Co.** (1915) 94 Kan. 501, 146 Pac. 1026—223.
- Smith's Dock Co. v. Readhead** [1912] 2 K. B. (Eng.) 323, 81 L. J. K. B. N. S. 808, 106 L. T. N. S. 843, 28 Times L. R. 397, [1912] W. C. Rep. 217, 5 B. W. C. C. 449, [1912] W. N. 131—103, 362.
- Smithers v. Wallis** [1903] 1 K. B. (Eng.) 200, 72 L. J. K. B. N. S. 57, 67 J. P. 381, 51 Week. Rep. 261, 87 L. T. N. S. 556, 19 Times L. R. 111—192.
- Smolenski v. Eastern Coal Dock Co.** (1915) — N. J. L. —, 93 Atl. 85—260.
- Sneddon v. Addie & Sons' Colliery Co.** (1905) 6 Sc. Sess. Cas. 5th series, 992, 41 Scot. L. R. 826, 12 Scot. L. T. 229—126, 371.
- v. Greenfield Coal & Brick Co.** [1909—10] S. C. 362, 47 Scot. L. R. 337, 3 B. W. C. C. 557—52, 338.
- Snell v. Bristol Corp.** [1914] 2 K. B. (Eng.) 291, 83 L. J. K. B. N. S. 353, 110 L. T. N. S. 563, [1914] W. N. 47, [1914] W. C. & Ins. Rep. 103, 7 B. W. C. C. 236—142, 151.
- v. Gross, Sherwood & Heald** [1913] W. C. & Ins. Rep. (Eng.) 141, 6 B. W. C. C. 242—183.
- Snelling v. Norton Hill Colliery Co.** [1913] W. C. & Ins. Rep. (Eng.) 497, 109 L. T. N. S. 81, 6 B. W. C. C. 506—86, 88.
- Snykus v. Big Muddy Coal & I. Co.** (1914) 190 Ill. App. 602—222.
- Sorensen v. Gaff** [1912] S. C. 1163, 49 Scot. L. R. 896, 6 B. W. C. C. 279—149.
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**v. Stewart**, 52 Wash. 61, 100 Pac. 153, 17 Ann. Cas. 411—359.
- State ex rel. Coffey v. Chittenden**, 112 Wis. 569, 88 N. W. 587—369.
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- Carlson v. District Ct.** (1915) — Minn. —, 154 N. W. 661—216, 253.
- Crookston Lumber Co. v. District Ct.** (1915) — Minn. —, 154 N. W. 509—250, 251, 253, 254.
- Duluth Brewing & Malting Co. v. District Ct.** (1915) 129 Minn. 176, 151 N. W. 912—216, 227, 232, 238, 346.
- Duluth Diamond Drilling Co. v. District Ct.** (1915) 129 Minn. 423, 152 N. W. 838—245, 260, 262, 271.
- Garwin v. District Ct.** (1915) 129 Minn. 156, 151 N. W. 910, 8 N. C. C. A. 1052—256.
- Gaylord Farmers' Co-op. Creamery Asso. v. District Ct.** 128 Minn. 486, 151 N. W. 182—253, 261.
- Kennedy v. District Ct.** (1915) 129 Minn. 91, 151 N. W. 530, 8 N. C. C. A. 478—257.
- Nelson-Spelliscy Implement Co. v. District Ct.** (1914) 128 Minn. 221, 150 N. W. 623—266, 410, 426.
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- People's Coal & Ice Co. v. District Ct.** (1915) 129 Minn. 502, 153 N. W. 119 (reported in full herein, p. 344)—228, 241, 347.
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- Virginia & R. L. Co. v. District Ct.** (1914) 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076—215, 247.
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- N. C. Foster Lumber Co. v. Williams**, 123 Wis. 61, 100 N. W. 1048—369.
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- Steers v. Dunnewald** (1913) 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676—231, 242.
- Stephens v. Dudbridge Ironworks Co.** [1904] 2 K. B. (Eng.) 225, 73 L. J. K. B. N. S. 739, 68 J. P. 437, 52 Week. Rep. 644, 90 L. T. N. S. 838, 20 Times L. R. 492, 6 W. C. C. 48—74, 82.
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- Stewart v. Baltimore & O. R. Co.** 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105—433.
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- Stickley's Case** (1914) 219 Mass. 513, 107 N. E. 350—255, 268, 322, 380.
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- Strannigan v. Baird** (1904) 6 Sc. Sess. Cas. 5th series, 784, 41 Scot. L. R. 609, 12 Scot. L. T. 152—161.
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- v. Nixon** [1901] A. C. (Eng.) 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156, 3 W. C. C. 1—207, 210.
- Sturges v. Crowinshield**, 4 Wheat. 122, 4 L. ed. 529—459.
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- Sullivan, Re** (1914) 218 Mass. 141, 105 N. E. 463, 5 N. C. C. A. 735 (reported in full herein, p. 378)—215, 255,
- Summerlee Iron Co. v. Freeland** [1913] A. C. (Eng.) 221, 82 L. J. P. C. N. S. 102, 108 L. T. N. S. 465, 29 Times L. R. 277, 57 Sol. Jo. 281, [1913] W. N. 34, [1913] W. C. & Ins. Rep. 302, 6 B. W. C. C. 255, [1913] S. C. (H. L.) 3—80.
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- Superior v. Industrial Commission** (1915) 160 Wis. 541, 152 N. W. 151, 8 N. C. C. A. 960—239.
- Susznik v. Alger Logging Co.** (1915) — Or. —, 147 Pac. 922—246.
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- v. Great Northern R. Co.** (1910) 3 B. W. C. C. (Eng.) 160—182.
- v. Wauwatosa**, 29 Wis. 21, 9 Am. Rep. 534—[17] 481.
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- Swansea Vale, The v. Rice** (1911) 104 L. T. N. S. 658, 27 Times L. R. 440, 55 Sol. Jo. 497, 48 Scot. L. R. 1095, 4 B. W. C. C. 298—69, 301.
- v. Rice** [1912] A. C. (Eng.) 238, 81 L. J. K. B. N. S. 672, [1912] W. C. Rep. 242, 12 Asp. Mar. L. Cas. 47, 104 L. T. N. S. 658, 55 Sol. Jo. 497, 27 Times L. R. 440, Ann. Cas. 1912C, 899—69, 301.
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**Symon v. Wemyss Coal Co.** [1912] S. C. 1239, 49 Scot. L. R. 921, 6 B. W. C. C. 298—**49**.  
**Synkus v. Big Muddy Coal & I. Co.** (1914) 190 Ill. App. 602—**220**.

## T

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**Tallman v. Chippewa Sugar Co.** (1913) 155 Wis. 36, 143 N. W. 1054—**215**.  
**Tamworth Colliery Co. v. Hall** [1911] A. C. (Eng.) 665, 105 L. T. N. S. 449, 55 Sol. Jo. 615, 4 B. W. C. C. 313—**136**.  
**v. Hall** [1911] 1 K. B. (Eng.) 341, 80 L. J. K. B. N. S. 304, 103 L. T. N. S. 782, 4 B. W. C. C. 107—**136**.  
**Taylor v. Bolckow** (1911) 5 B. W. C. C. (Eng.) 130—**141**.  
**v. Burnham** [1909] S. C. 704, 46 Scot. L. R. 482—**109**.  
**v. Burnham** [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. C. C. 569—**109, 114, 118**.  
**v. Clark** [1914] S. C. (H. L.) 104, [1914] 2 Scot. L. T. 125, 51 Scot. L. R. 740, 58 Sol. Jo. 738, 7 B. W. C. C. 871, [1914] W. N. 327, [1914] W. C. & Ins. Rep. 448, 11 L. T. N. S. 882, 84 L. J. P. C. N. S. 14, rev'g [1914] S. C. 432, 1 Scot. L. T. 336, 51 Scot. L. R. 418, 7 B. W. C. C. 856—**141**.  
**v. Cripps** [1914] 3 K. B. (Eng.) 989, 83 L. J. K. B. N. S. 1538, 7 B. W. C. C. 623, 30 Times L. R. 616—**177, 178**.  
**v. George W. Bush & Sons Co.** 6 Penn. (Del.) 306, 12 L.R.A. (N.S.) 853, 66 Atl. 884—**329**.  
**v. Hamstead Colliery Co.** [1904] 1 K. B. (Eng.) 838, 73 L. J. K. B. N. S. 469, 68 J. P. 300, 52 Week. Rep. 417, 90 L. T. N. S. 363, 20 Times L. R. 338—**75**.  
**v. Jones** (1907; C. C.) 123 L. T. Jo. (Eng.) 553, 1 B. W. C. C. 3—**60**.  
**v. London & N. W. R. Co.** [1912] A. C. (Eng.) 242, 81 L. J. K. B. N. S. 541, 106 L. T. N. S. 354, 28 Times L. R. 290, 56 Sol. Jo. 323, [1912] W. C. C. 95, [1912] W. N. 53, 49 Scot. L. R. 1020, 5 B. W. C. C. 218—**165, 169**.  
**v. Nicholson** [1915] W. C. & Ins. Rep. (Eng.) 42, 8 B. W. C. C. 114—**87**.  
**v. Seabrook** (1915) — N. J. L. —, 94 Atl. 399—**244, 250, 252, 262, 355**.  
**v. Southern R. Co.** (C. C.) 178 Fed. 380—**455**.  
**v. Taylor**, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436—**458**.  
**v. The Cecil Syndicate** (1906) Queensl. St. Rep. 324—**195**.  
**v. Ward** (1914) 7 B. W. C. C. (Eng.) 441—**180**.  
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**Tench v. Fish** (1901; C. C.) 3 W. C. C. (Eng.) 140—**207**.  
**Terlecki v. Strauss** (1914) 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584, affirmed in 86 N. J. L. 798, 92 Atl. 1087—**237**.  
**Thackway v. Connelly** (1909) 3 B. W. C. C. (Eng.) 37—**39**.  
**Thayne v. Gray** [1915] W. C. & Ins. Rep. (Eng.) 64, 8 B. W. C. C. 17—**147**.  
**Thoburn v. Bedlington Coal Co.** (1911) 5 B. W. C. C. (Eng.) 128—**133, 292**.  
**Thomas v. Cory Bros.** (1911) 5 B. W. C. C. (Eng.) 5—**182**.  
**v. Fairbairne** (1911) 4 B. W. C. C. (Eng.) 195—**137**.  
**Thompson v. Ashington Coal Co.** (1901) 84 L. T. N. S. (Eng.) 412, 17 Times L. R. 345, 84 L. T. N. S. 412—**36, 291, 292**.  
**v. Ferraro** (1913) 57 Sol. Jo. (Eng.) 479, 6 B. W. C. C. 461—**172**.  
**v. Goold** [1910] A. C. (Eng.) 409, 79 L. J. K. B. N. S. 905, 103 L. T. N. S. 81, 26 Times L. R. 526, 54 Sol. Jo. 599, 3 B. W. C. C. 392—**84, 85**.  
**v. Johnson** [1914] 3 K. B. (Eng.) 694, [1914] W. N. 281, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 333, 7 B. W. C. C. 479—**139**.  
**v. Newton** (1914) 7 B. W. C. C. (Eng.) 703—**148**.  
**v. North-Eastern Marine Engineering Co.** (1914) 110 L. T. N. S. (Eng.) 441, [1914] W. N. 22, [1914] W. C. & Ins. Rep. 13, 7 B. W. C. C. 49—**90**.  
**v. North Eastern Marine Engineering Co.** [1903] 1 K. B. (Eng.) 428, 72 L. J. K. B. N. S. 222, 88 L. T. N. S. 239, 19 Times L. R. 206—**103, 362**.  
**v. Sinclair** [1906] 2 K. B. (Eng.) 278, note—**206**.  
**v. Thompson**, 53 Wis. 153, 10 N. W. 166—**369**.  
**Thomson v. Flemington Coal Co.** [1911] S. C. 823, 48 Scot. L. R. 740, 4 B. W. C. C. 406—**47, 318**.  
**Thorn v. Humm** (1915) 31 Times L. R. (Eng.) 194, 8 B. W. C. C. 190—**41**.  
**Thornber v. Durkin** [1914] W. C. & Ins. Rep. (Eng.) 341, 7 B. W. C. C. 548—**145**.  
**Thranmere Bay Development Co. v. Brennan** (1909) 2 B. W. C. C. (Eng.) 403—**164**.  
**Tibbs v. Watts** (1909) 2 B. W. C. C. (Eng.) 164—**88, 89**.  
**Timmins v. Leeds Forge Co.** (1900) 16 Times L. R. (Eng.) 521, 83 L. T. N. S. 120—**32, 298, 303**.  
**Timpson v. Mowlem** (1915) 112 L. T. N. S. (Eng.) 885, 8 B. W. C. C. 178—**110**.  
**Tindall v. Great Northern S. S. Fishing Co.** (1912) 56 Sol. Jo. (Eng.) 720, 5 B. W. C. C. 667—**105**.  
**Tischman v. Central R. Co.** (1913) 84 N. J. L. 527, 87 Atl. 144, 4 N. C. C. A. 736—**253**.

- Tobin v. Hearn** [1910] 2 I. R. 639, 44 Ir. Law Times, 197—49.
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- Tomalin v. S. Pearson & Son** [1909] 2 K. B. (Eng.) 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1—104, 445.
- Tombs v. Bomford** (1912) W. C. Rep. (Eng.) 229, 106 L. T. N. S. 823, 5 B. W. C. C. 338—120, 366.
- Tomlin v. Hildreth**, 65 N. J. L. 440, 47 Atl. 649—279.
- Tomlinson v. Garratts** [1913] W. C. & Ins. Rep. (Eng.) 416, 6 B. W. C. C. 489—55.
- Tong v. Great Northern R. Co.** (1902; Div. Ct.) 86 L. T. N. S. (Eng.) 802, 66 J. P. 677, 18 Times L. R. 566—101, 361.
- Toole v. The Isle of Erin** (1909) 3 B. W. C. C. (Eng.) 110—123.
- Toombs v. Bomford**, 106 L. T. N. S. 823, [1912] W. C. Rep. 229, 5 B. W. C. C. 338—364.
- Topping v. Rhind** (1904) 6 Sc. Sess. Cas. 5th series, 666, 41 Scot. L. R. 573, 12 Scot. L. T. 88—212.
- Travelers' Ins. Co. v. Hallauer**, 131 Wis. 371, 111 N. W. 527—369.
- Traynor v. Addie** (1911) 48 Scot. L. R. 820, 4 B. W. C. C. 357—55.
- Trehear v. Wells** (1900; C. C.) 3 W. C. C. (Eng.) 58—80, 85.
- Trigg v. Vauxhall Motors** [1914] W. C. & Ins. Rep. (Eng.) 251, 7 B. W. C. C. 462—40.
- Trim Joint Dist. School v. Kelly** [1914] A. C. (Eng.) 667, 111 L. T. N. S. 306, 30 Times L. R. 452, [1914] W. N. 177, 83 L. J. P. C. N. S. 220, 58 Sol. Jo. 493, 48 Ir. Law Times, 141, [1914] W. C. & Ins. Rep. 359, 7 B. W. C. C. 274—31, 39, 64, 306, 309.
- Trodden v. J. McLennard & Sons** (1911) 4 B. W. C. C. (Eng.) 190—34, 293.
- Troth v. Millville Bottle Works** (1914) 86 N. J. L. 558, 91 Atl. 1031—222, 426.
- Truesdell v. Chesapeake & O. R. Co.** 159 Ky. 718, 169 S. W. 471—459.
- Tucker v. Oldbury Urban Dist. Council** [1912] 2 K. B. (Eng.) 317, 81 L. J. K. B. N. S. 668, 106 L. T. N. S. 669, [1912] W. C. Rep. 238, [1912] W. N. 96, 5 B. W. C. C. 296—135.
- Tullock v. Waygood** [1906] 2 K. B. (Eng.) 261, 75 L. J. K. B. N. S. 557, 95 L. T. N. S. 223—200, 209.
- Turnbull v. Lempton Collieries Co.** (1900) 82 L. T. N. S. (Eng.) 589, 16 Times L. R. 369, 64 J. P. 404—195, 209.
- v. Vickers** (1914) 7 B. W. C. C. (Eng.) 396—92.
- Turner v. Bell** (1910) 4 B. W. C. C. (Eng.) 63—179, 301.
- v. Brooks** (1909) 3 B. W. C. C. (Eng.) 22—137.
- Turner v. Miller** (1910) 3 B. W. C. C. (Eng.) 305—122.
- v. Port of London Authority** [1913] W. C. & Ins. Rep. (Eng.) 123, 29 Times L. R. 204, 6 B. W. C. C. 23—154, 157.
- v. St. Clair Tunnel Co.** 111 Mich. 578, 36 L.R.A. 134, 66 Am. St. Rep. 397, 70 N. W. 146, 1 Am. Neg. Rep. 270—430.
- v. The Haulwen** [1915] W. C. & Ins. Rep. (Eng.) 50, 8 B. W. C. C. 242—105.
- Turners v. Whitefield** (1905) 6 Sc. Sess. Cas. 5th series, 822, 41 Scot. L. R. 631, 12 Scot. L. T. 131—126, 371.
- Turnquist v. Hannon** (1914) 219 Mass. 560, 107 N. E. 443—225, 226, 362, 428.
- Tutton v. The Majestic** [1909] 2 K. B. (Eng.) 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 452, 53 Sol. Jo. 447, 2 B. W. C. C. 346—140, 148, 387, 388.
- Tyne Tees Shipping Co. v. Whitlock** [1913] 3 K. B. (Eng.) 642, 82 L. J. K. B. N. S. 1091, 109 L. T. N. S. 84, [1913] W. N. 237, 57 Sol. Jo. 716, [1913] W. C. & Ins. Rep. 579, 6 B. W. C. C. 559—165.
- Tynron v. Morgan** [1909] 2 K. B. (Eng.) 66—169.

## U

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- v. Simpson** [1909] A. C. (Eng.) 383, 78 L. J. C. P. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308, aff'g [1908] S. C. 1215, 45 Scot. L. R. 944, 1 B. W. C. C. 289—135.
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- v. Thomas** [1909] 2 K. B. (Eng.) 631, 78 L. J. K. B. N. S. 1113—166, 167.

## V

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- Vujic v. Youngstown Sheet & Tube Co.** (1914) 220 Fed. 390—251, 252.
- W**
- Waal v. Steel** (1915) 112 L. T. N. S. (Eng.) 846—165, 171.
- Wabash R. Co. v. Hayes**, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224—458, 459.
- Waddell v. Coltness Iron Co.** [1913] W. C. & Ins. Rep. 42, 52 Scot. L. R. 29, 6 B. W. C. C. 306—77, 357.
- Wagner v. Chicago & A. R. Co.** 265 Ill. 245, 106 N. E. 809—459.
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- Wagstaff v. Perks** (1902) 51 Week. Rep. (Eng.) 210, 87 L. T. N. S. 558, 5 W. C. C. 110, 19 Times L. R. 112—96, 212, 213.
- Waites v. Franco-British Exhibition** (1909) 25 Times L. R. (Eng.) 441—116.
- Walker, Re** (1915) 215 N. Y. 529, 109 N. E. 604—421, 461.
- Walker v. Crystal Palace Football Club** [1910] 1 K. B. (Eng.) 87, 79 L. J. K. B. N. S. 229, 101 L. T. N. S. 645, 26 Times L. R. 71, 54 Sol. Jo. 65, 3 B. W. C. C. 53, Ann. Cas. 1913C, 25—116.
- v. Hockney Bros.** (1909) 2 B. W. C. C. (Eng.) 20—36, 290.
- v. Lilleshall Coal Co.** [1900] 1 Q. B. (Eng.) 488, 81 L. T. N. S. 769, 69 L. J. Q. B. N. S. 192, 64 J. P. 85, 48 Week. Rep. 257, 16 Times L. R. 108—33, 35, 278, 294.
- v. Mullins** (1908) 42 Ir. Law Times, 168, 1 B. W. C. C. 211—71, 293.
- v. Murray** [1911] S. C. 825, 48 Scot. L. R. 741, 4 B. W. C. C. 409—39.
- Wallace v. Fife Coal Co.** [1909] S. C. (Scot.) 682—163.
- v. Glenboig Fire Clay Co.** [1907] S. C. (Scot.) 967, cited in 2 Mews' Dig. (1898-07) Supp. 1547—75, 355.
- v. Hawthorne** [1908] S. C. 713, 45 Scot. L. R. 547—128.
- Wallis v. McNeice** (1912) 46 Ir. L. T. 202, 6 B. W. C. C. 445—148.
- v. Soutter** [1915] W. N. (Eng.) 68, 59 Sol. Jo. 285, [1915] W. C. & Ins. Rep. 113, 8 B. W. C. C. 130—111, 191.
- Walsh v. Hayes** (1909) 43 Ir. Law Times, 114—97.
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- Walters v. Staveley Coal & I. Co.** (1911; H. L.) 105 L. T. N. S. (Eng.) 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303—62, 332.
- Walton v. South Kirby, F. & H. Colliery** (1912) 107 L. T. N. S. (Eng.) 337, 5 B. W. C. C. 640—145.
- v. Tredegar Iron & Coal Co.** [1913] W. C. & Ins. Rep. (Eng.) 457, 6 B. W. C. C. 592—61, 331.
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- Ward v. London & N. W. R. Co.** (1901; C. C.) 3 W. C. C. (Eng.) 192—137.
- v. Miles** (1911) 4 B. W. C. C. (Eng.) 182—138.
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- Warner v. Couchman** [1911] 1 K. B. (Eng.) 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, [1910] W. N. 266, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51, aff'd in H. L. [1911] W. N. 220, 81 L. J. K. B. N. S. 45, 28 Times L. R. 58, 56 Sol. Jo. 70—43.
- v. Couchman** [1912] A. C. (Eng.) 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177—31, 240, 281, 308.
- Warnock v. Glasgow Iron & Steel Co.** (1904) 6 Sc. Sess. Cas. (Scot.) 5th series, 584—295.
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- v. Roxburgh** (1912) 106 L. T. N. S. (Eng.) 555, 5 B. W. C. C. 263, [1912] W. C. Rep. 306—177, 178, 188.
- Warwick S. S. Co. v. Callaghan** (1912) 5 B. W. C. C. (Eng.) 283—141.
- Wasilewski v. Warner Sugar Refinery Co.** (1914) 87 Misc. 156, 149 N. Y. Supp. 1035—221, 428.
- Wassell v. Russell** (1915) 112 L. T. N. S. (Eng.) 902, [1915] W. C. & Ins. Rep. 88, [1915] W. N. 69, 8 B. W. C. C. 230—86, 89, 91.
- Watkins v. Guest** [1912] W. C. Rep. (Eng.) 150, 106 L. T. N. S. 818, 5 B. W. C. C. 307—41, 52, 53.
- Watkinson v. Crouch** (1899; C. C.) 107 L. T. Jo. (Eng.) 328, 1 W. C. C. 137—201, 209.
- Watson v. Beardmore** [1914] S. C. 718, [1914] 2 Scot. L. T. 481, 51 Scot. L. R. 621, 7 B. W. C. C. 913—170.
- v. Butterley Co.** (1902; C. C.) 114 L. T. Jo. (Eng.) 178, 5 W. C. C. 51—77, 357.
- v. Sherwood** (1909; C. C.) 127 L. T. Jo. (Eng.) 86, 2 B. W. C. C. 462—47.
- Watters v. Clover** (1901) 18 Times L. R. (Eng.) 60—156.
- v. P. E. Kroehler Mfg. Co.** (1914) 187 Ill. App. 548, 8 N. C. C. A. 352—256.
- Watts v. Logan** [1914] W. C. & Ins. Rep. (Eng.) 48, 7 B. W. C. C. 82—164.
- Weavings v. Kirk** [1904] 1 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 77, 68 J. P. 91, 52 Week. Rep. 209, 89 L. T. N. S. 577, 20 Times L. R. 152—211, 212.
- Webber v. Wansbrough Paper Co.** (1914; H. L.) 137 L. T. Jo. (Eng.) 237, [1914] W. N. 290, 111 L. T. N. S. 658, 30 Times L. R. 615, 58 Sol. Jo. 685, 7 B. W. C. C. 795, rev'g the ct. of app. [1913] 3 K. B. (Eng.) 615, 82 L. J. K. B. N. S. 1058, 109 L. T. N. S. 129, 29 Times L. R. 704, [1913] W. N. 236, 6 B. W. C. C. 583—51.
- Weber v. American Silk Spinning Co.** (1915) — R. I. —, 95 Atl. 603—255, 258, 266.
- Webster v. Cohen Bros.** (1913) 108 L. T. N. S. (Eng.) 197, 29 Times L. R. 217, [1913] W. C. & Ins. Rep. 268, 57 Sol. Jo. 244, 6 B. W. C. C. 92—91.
- v. London & N. W. R. Co.** (1901; C. C.) 3 W. C. C. (Eng.) 52—80.
- v. Sharp** [1904] 1 K. B. (Eng.) 218, 73 L. J. K. B. N. S. 141, 68 J. P. 140, 52 Week. Rep. 275, 89 L. T. N. S. 627, 20 Times L. R. 121, aff'd in [1905] A. C. 284, 74 L. J. K. B. N. S. 776, 92 L. T. N. S. 373—141.
- Weekes v. Stead** [1914] W. N. (Eng.) 263, 30 Times L. R. 586, 58 Sol. Jo. 633, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 434, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 7 B. W. C. C. 398, 6 N. C. C. A. 1010—64, 309.
- Weighill v. South Hetton Coal Co.** [1911] 2 K. B. (Eng.) 757, note—46, 78.
- Weir v. North British R. Co.** (1912) 49 Scot. L. R. 772, [1912] S. C. 1073, 5 B. W. C. C. 595—169.
- v. Petrie** (1900) 2 Sc. Sess. Cas. 5th series, 1041, 37 Scot. L. R. 795, 8 Scot. L. T. 75—200.
- Wellington v. Boston & M. R. Co.** 158 Mass. 185, 33 N. E. 393—280.
- Wells v. Cardiff Steam Coal Collieries** (1909) 3 B. W. C. C. (Eng.) 104—141.
- Wendt v. Industrial Ins. Commission** (1914) 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790—216, 219, 239.
- Westcott & L. Lines v. Price** [1912] W. C. Rep. (Eng.) 280, 5 B. W. C. C. 430—171.
- Western Indemnity Co. v. Pillsbury** (1915) — Cal. —, 151 Pac. 398—214, 231, 240, 267, 269, 309, 420, 421, 424.
- West Jersey Trust Co. v. Philadelphia & R. Co.** (1915) — N. J. L. —, 95 Atl. 753—227, 244, 355, 443, 463.
- Wheeler v. Contoocook Mills Corp.** (1915) 77 N. H. 551, 94 Atl. 265—217, 237, 413.
- v. Dawson** [1913] W. C. & Ins. Rep. (Eng.) 59, 5 B. W. C. C. 645—179.
- Whelan v. Great Northern Steam Shipping Co.** [1909] W. N. (Eng.) 135, 78 L. J. K. B. N. S. 860, 100 L. T. N. S. 913, 25 Times L. R. 619—105.
- v. Moore** (1909) 43 Ir. Law Times, 205—56.
- White v. Harris** (1911) 4 B. W. C. C. (Eng.) 39—139.
- v. Sheepwash** (1910) 3 B. W. C. C. (Eng.) 382—40.
- v. Wiseman** [1912] 3 K. B. (Eng.) 352, 81 L. J. K. B. N. S. 1195, 107 L. T. N. S. 277, 28 Times L. R. 542, 56 Sol. Jo. 703, [1912] W. N. 216, 5 B. W. C. C. 654, Ann. Cas. 1913D, 1021—153, 373.
- Whitebread v. Arnold** (1908) 99 L. T. N. S. (Eng.) 103—60, 331.



- Whitehead v. Reader** [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387, 3 W. C. C. 40—53, 54, [23] 487.
- Whiteman v. Clifden** [1913] W. C. & Ins. Rep. (Eng.) 126, 6 B. W. C. C. 49—49.
- Whitfield v. Lambert** (1915) 112 L. T. N. S. (Eng.) 803, [1915] W. C. & Ins. Rep. 48, 8 B. W. C. C. 91—46, 323.
- Wicks v. Dowell & Co.** (1905) 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732—34, 280, 294, 338.
- Wiemert v. Boston Elev. R. Co.** (1914) 216 Mass. 598, 104 N. E. 360—230, 322, 336.
- Wilkinson v. Car & General Ins. Corp.** (1914) 110 L. T. N. S. (Eng.) 468, [1914] W. N. 31, 58 Sol. Jo. 233—84.
- v. Frodingham Iron & Steel Co.** [1913] W. C. & Ins. Rep. (Eng.) 335, 6 B. W. C. C. 200—137.
- v. Mercer** (1914) 125 Minn. 201, 146 N. W. 362—271.
- Williams v. Army & Navy Auxiliary Co-op. Soc.** (1907) 23 Times L. R. (Eng.) 408—83.
- v. Bwlffa & M. D. S. Collieries** [1914] 2 K. B. (Eng.) 30, 83 L. J. K. B. N. S. 442, 110 L. T. N. S. 561, [1914] W. N. 44, 7 B. W. C. C. 124—167.
- v. Caeponthren Colliery Co.** [1913] W. C. & Ins. Rep. (Eng.) 155, 6 B. W. C. C. 122—183.
- v. Duncan** (1898; C. C.) 1 W. C. C. (Eng.) 123—35, 290.
- v. Llandudno Coaching & Carriage Co.** (1915) 31 Times L. R. (Eng.) 186, 84 L. J. K. B. N. S. 655, [1915] W. C. & Ins. Rep. 91 [1915] W. N. 52, 59 Sol. Jo. 286 [1915] 2 K. B. 101, 112 L. T. N. S. 848, 8 B. W. C. C. 143—50, 63, 352.
- v. Mack** (1903; C. C.) 116 L. T. Jo. (Eng.) 179, 6 W. C. C. 113—121.
- v. Ocean Coal Co.** [1907] 2 K. B. (Eng.) 422, 76 L. J. K. B. N. S. 1073, 97 L. T. N. S. 150, 23 Times L. R. 584—122, 124.
- v. Poulson** (1899) 16 Times L. R. (Eng.) 42, 63 J. P. 757, 2 W. C. C. 126—149, 156, 157, 373.
- v. Ruabon Coal & Coke Co.** [1914] W. C. & Ins. Rep. (Eng.) 32, 7 B. W. C. C. 202—145.
- v. Smith** (1913) 108 L. T. N. S. (Eng.) 200 [1913] W. C. & Ins. Rep. 146, 6 B. W. C. C. 102—60, 332.
- v. The Duncan** [1914] 3 K. B. (Eng.) 1039, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767—106.
- v. The Maritime** [1915] 2 K. B. (Eng.) 137, 84 L. J. K. B. N. S. 633, [1915] W. C. & Ins. Rep. 97, 8 B. W. C. C. 267, [1915] W. N. 71, 31 Times L. R. 218—121.
- Williams v. Vauxhall Colliery Co.** [1907] 2 K. B. (Eng.) 433, 76 L. J. K. B. N. S. 854, 97 L. T. N. S. 559, 23 Times L. R. 591—135.
- v. Wigan Coal & I. Co.** (1909) 3 B. W. C. C. (Eng.) 65—46.
- v. Williams**, 122 Wis. 27, 99 N. W. 431—369.
- v. Wynnstay Collieries** (1910) 3 B. W. C. C. (Eng.) 473—149.
- Willmott v. Paton** [1902] 1 K. B. (Eng.) 237, 71 L. J. K. B. N. S. 1, 66 J. P. 197, 50 Week. Rep. 148, 85 L. T. N. S. 569, 18 Times L. R. 48, 4 W. C. C. 65—201, 206.
- Willoughby v. Great Western R. Co.** (1904; C. C.) 117 L. T. Jo. (Eng.) 132, 6 W. C. C. 28—35, 294.
- Wilmerson v. Lynn & H. S. S. Co.** [1913] 3 K. B. 931; (Eng.) 82 L. J. K. B. N. S. 1064, 109 L. T. N. S. 53, 29 Times L. R. 652, 57 Sol. Jo. 700, [1913] W. C. & Ins. Rep. 633, 6 B. W. C. C. 542—113.
- Wilmington Transp. Co. v. Railroad Commission**, 236 U. S. 151, 59 L. ed. 508, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276—449.
- Wilson v. Dorfinger** (1915) — App. Div. —, 155 N. Y. Supp. 857—218.
- v. Jackson's Stores** (1905) 7 W. C. C. (Eng.) 122—170.
- v. Kelly** (1909) 14 B. C. 436—82.
- v. Laing** [1909] S. C. 1230, 46 Scot. L. R. 843—47.
- v. Ocean Coal Co.** (1905) 21 Times L. R. (Eng.) 621, aff'g 21 Times L. R. 195—94.
- Winfield v. New York C. & H. R. R. Co.** (1915) 168 App. Div. 351, 153 N. Y. Supp. 499—215, 420, 452, 464.
- v. New York C. & H. R. R. Co.** (1915) 216 N. Y. 284, 110 N. E. 614—215, 420, 452, 464.
- Winters v. Addie & Sons' Collieries** [1911] S. C. 1174, 48 Scot. L. R. 940—110.
- Wolsey v. Pethick Bros.** (1908) 1 B. W. C. C. (Eng.) 411—179.
- Wood v. Camden Iron Works** (1915) 221 Fed. 1010—215, 245.
- v. Davis** (1911) 5 B. W. C. C. (Eng.) 113—68.
- v. Walsh** [1899] 1 Q. B. (Eng.) 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 15 Times L. R. 279—198, 199.
- Woodcock v. London & N. W. R. Co.** [1913] 3 K. B. (Eng.) 139, 82 L. J. K. B. N. S. 921, 109 L. T. N. S. 253, 29 Times L. R. 566 [1913] W. N. 179, [1913] W. C. & Ins. Rep. 563, 6 B. W. C. C. 471—101, 361.
- v. Walker** (1915) — App. Div. —, 115 N. Y. Supp. 702—252.
- Wooder v. Lush** [1914] 7 B. W. C. C. (Eng.) 673—81.
- Woodham v. Atlantic Transport Co.** [1899] 1 Q. B. (Eng.) 15, 68 L. J. Q. B. N. S. 17, 79 L. T. N. S. 395, 47 Week. Rep. 105, 15 Times L. R. 51, 1 W. C. C. 52—207.

- Woodhouse v. Midland R. Co.** [1914] 3 K. B. (Eng.) 1034, 30 Times L. R. 653, 83 L. J. K. B. N. S. 1810, 7 B. W. C. C. 690—139.
- Woods v. Wilson** [1915] W. N. (Eng.) 109, 84 L. J. K. B. N. S. 1067, 31 Times L. R. 273, 59 Sol. Jo. 348, 8 B. W. C. C. 288—35, 179, 294.
- v. Wilson** [1913] W. C. & Ins. Rep. (Eng.) 569, 29 Times L. R. 726, 6 B. W. C. C. 750—40, 134, 293.
- Workman v. New York**, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212—448.
- Wray v. Taylor Bros.** [1913] W. C. & Ins. Rep. (Eng.) 446, 109 L. T. N. S. 120, 6 B. W. C. C. 530, 4 N. C. C. A. 935—58.
- Wright v. Bagnall** [1900] 2 Q. B. (Eng.) 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327—85, 92, 93.
- v. Kerrigan** [1911] 2 I. R. 301, 45 Ir. Law Times, 82, 4 B. W. C. C. 432—71, 301, 302.
- v. Lindsay** (1911) 5 B. W. C. C. 31, 49 Scot. L. R. 210—102, 361.
- v. Scott** [1912] 5 B. W. C. C. (Eng.) 431—53.
- v. Sneyd Collieries** (1915) 84 L. J. K. B. N. S. (Eng.) 1332—139, 180.
- Wrigley v. Bagley** [1901] 1 K. B. (Eng.) 780, 70 L. J. K. B. N. S. 538, 84 L. T. N. S. 415, 3 W. C. C. 61, 49 Week. Rep. 472, 65 J. P. 372—95, 98, 201, 208.
- v. Bagley** [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559—95, 98, 201, 208.
- v. Whittaker** [1902] A. C. (Eng.) 299, 71 L. J. K. B. N. S. 600, 86 L. T. N. S. 775, 18 Times L. R. 559, 50 Week. Rep. 656, 66 J. P. 420, 4 W. C. C. 93—195, 200, 208, 211.
- Wrigley v. Wilson** [1913] W. C. & Ins. Rep. (Eng.) 145, 6 B. W. C. C. 90—47.

## Y

- Yates v. South Kirkby, F. & H. Collieries** [1910] 2 K. B. (Eng.) 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225—31.
- Young v. Duncan** (1914) 218 Mass. 346, 106 N. E. 1—214, 215, 221, 268, 426, 463.
- v. Niddrie & B. Coal Co.** [1913] A. C. (Eng.) 531, 82 L. J. P. C. N. S. 147, 109 L. T. N. S. 568, 29 Times L. R. 626, 57 Sol. Jo. 685, [1913] W. N. 206, [1913] W. C. & Ins. Rep. 547, 6 B. W. C. C. 774, [1913] S. C. 66, 50 Scot. L. R. 744, rev'g [1912] S. C. 644, 49 Scot. L. R. 518, 5 B. W. C. C. 552—123.
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## Z

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# INDEX

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## ABSENCES FROM WORK.

Consideration to be given to, in determining average weekly earnings, 152.

## ACCIDENT.

Definition of, generally, 30, 227.

Scope of phrase as used in American statutes, 227.

Use of word, "fortuitous" in defining accident, as misleading, 30.

Injury by, must be referable to definite time, place and circumstance, 30, 228.

Hernia or rupture as, 32, 228.

Strain resulting from overexertion as, 32.

Nervous shock as, 31.

Disease as, 36, 37.

Occupational disease as, 35, 228.

Infection with anthrax as, 37.

General breakdown due to overwork as, 36.

Incapacity from exposure as, 36, 37.

Sunstroke or heat stroke as, 38.

Injury from assault as injury by, 38, 231.

Injury by violence of third person as, 31.

Burden of proof as to, 39, 231.

Proof of, by circumstantial evidence, 40, 231.

## ACTION FOR DAMAGES.

Recovery of compensation where action for damages has failed, 81-83.

## ACTIVE EMPLOYMENT.

Recovery of compensation for injuries received while not actively engaged in employment, 57, 235.

## ACT OF 1900.

Text of English act, 191.

## ACTUAL DEPENDENTS.

Who are, within the meaning of the New Jersey statute, 250.

## ACTUAL KNOWLEDGE.

Of employers of the injury, 244.

## ADAMS v. ACME WHITE LEAD & COLOR WORKS.

Decision in full, 283.

## AGREEMENTS.

Registration of memorandums of, 184.

Enforcement of, 188.

As to lump sum, 189.

## AIRSHIP OPERATOR.

As workman under the English act, 116.



## ALIEN DEPENDENTS.

Applicability of English act to, 125.

As within the protection of the American statutes, 251.

## ALLOWANCES.

Consideration of allowances received by workman from employer during period of incapacity, 148.

## ALTERNATIVE REMEDIES.

Furnished to workmen or dependents by the English act, 72.

Furnished by the American statutes, 223.

## AMOUNT RECOVERABLE.

By dependent, 134, 253.

By workman incapacitated totally or partially, 136, 254.

## “ANCILLARY OR INCIDENTAL” TO THE TRADE OR BUSINESS OF THE PRINCIPAL.

What work is, 97.

## ANTHRAX.

Infection by, as accident, 37.

## APOPLEXY.

Death from, as result of accident, 34.

## APPEALS.

From decision of arbitrator, 177.

To divisional court, when, 100, 112.

Provisions of act relative to appeals in Scotland, 127.

Methods of, under the American statutes, 266.

## APPOINTMENT.

Of arbitrators and medical referees under the English act, 111.

## APPORTIONMENT.

Of compensation recoverable between the dependents entitled thereto, 162, 252.

## ARBITRATION.

For settlement of disputes under the English act, 79-81, 174.

## ARBITRATORS.

Provisions of the English act relative to appointment and remuneration of, 111.

Powers and functions of, 177.

## ARISING “OUT OF AND IN THE COURSE OF” THE EMPLOYMENT.

Injuries on street as, 41, 233.

received while going to or from work as, 60, 235.

while not actively engaged in duties, 58, 234.

while procuring refreshments, 58, 237.

received while seeking toilet facilities as, 46, 236.

while workman is indulging in horse play, 47, 240.

while doing work in dangerous or negligent way, 50, 238.

while unnecessarily working around machinery, as, 48, 55.

while mounting or dismounting from moving cars, as, 49.

while disobeying rules or orders, 52, 238.

while obeying direct orders of superior, 62, 239.

## ARISING "OUT OF AND IN THE COURSE OF" THE EMPLOYMENT—continued.

- while riding bicycle, 48.
- while acting in emergencies, 56.
- caused by weather and climatic conditions; lightning, 43, 241.
- received by sailor while on shore, 65.
- from assault as, 64, 239.
- received while intoxicated as, 62, 238.
- Loss of eye through infection, as, 234.
- Self-inflicted injuries while insane as, 234.
- Burden of proof as to injury by accident arising out of and in the course of the employment, 67, 241.
- Circumstantial evidence to prove injury by accident arising out of and in the course of the employment, 70, 241.

## ASSAULT.

- Injuries from, as injuries by accident, 38, 231.
- Injuries by, as arising out of and in the course of the employment, 64, 239.
- Review of cases on recovery of compensation where workman suffers injury from assault, 309.

## ASSUMPTION OF RISK.

- Abrogation of defense of, as affecting validity of statute, 413.
- As affected by failure of employer to accept the provisions of the optional acts, 219.

## AT OR IMMEDIATELY BEFORE.

- Meaning of phrase as used in section 8 of the English act with reference to industrial diseases, 109.

## AUSTRALIA.

- Who are dependents under the acts of, 127.

## AVERAGE WEEKLY EARNINGS.

- Of injured employee, how computed under English act.
  - In general, 149.
  - Grades of employment, 150.
  - Concurrent employment, 152.
  - Absences from work, 152.
  - Period of time forming basis for computation, 155.
  - Trade or calendar week, 156.
  - Continuity of employment, 157.
  - Deductions, 158.
  - Remuneration other than regular wages, 159.
- Computation of, under the American statutes, 260.
- Review of cases on average weekly earnings under compensation acts of workman employed by several employers, 373.
- See also EARNINGS.

## AWARD.

- Varying of the award of compensation, 163.
- Review of, 163.
- Enforcement of, 188.
- Deductions from, 190.

## BANKRUPTCY.

- Text of English act relating to bankruptcy of employer, 98
- Securing compensation where employer is bankrupt, 99.



**BED.**

Injury to domestic servant while lying in, as arising out of and in the course of the employment, 58.

**BEING CONSTRUCTED OR REPAIRED.**

Meaning of phrase as used in English act of 1897, 197.

**BENEFITS.**

Consideration of benefits received by workman from employer during period of incapacity, 148.

**BICYCLE.**

Injuries received while riding, as arising out of the employment, 48.

**BLIND ASYLUM.**

Inmate of, as workmen under the English act, 117.

**BLOOD POISONING.**

As an accident, 36, 230.

**BOARD.**

Furnished to workman, consideration to be given to, in fixing average weekly earnings, 159.

**BOTTLE WASHING WORKS.**

As a factory, 202.

**BREAKDOWN.**

General breakdown due to overwork as accident, 36.

**BRIGHTMAN, RE.**

Decision in full, 321.

**BRITISH COLUMBIA.**

Who are dependents under the British Columbia act, 126.

Applicability of act to alien dependents, 125.

**BUILDING.**

What is, within meaning of English act of 1897, 196.

Height of, how measured under English act of 1897, 196.

Machinery temporarily used for the purpose of constructing, as a factory, 208.

**BURDEN OF PROOF.**

That injury was caused by accident, 39, 231.

That death was due to accident, 134.

As to whether accident arose out of and in the course of the employment, 67, 241.

As to whether employer has been prejudiced by employee's failure to give notice of injury, 88.

As to change in workman's condition justifying change in award, 171.

**BUSINESS.**

Consideration of profits in, in determining what injured employee is able to earn after the injury, 134.

What work is "ancillary or incidental" to the trade or business of the principal, 97.

What employment is "in the course of or for the purposes of" the principal's trade or business, 96.

CALENDAR WEEKS.

Use of, in determining average weekly earnings, 156.

CARS.

Injuries received while getting on or off moving cars, as arising out of the employment, 49.

CASUAL EMPLOYEES.

As workmen under the English act, 120.

As within the provisions of the American statutes, 247.

Review of cases on who are casual employees within the meaning of the workmen's compensation acts, 365.

CERTIFYING SURGEONS.

Functions of, with reference to industrial diseases, 110.

CHARWOMAN.

As workman under the English act, 120.

CIRCUMSTANTIAL EVIDENCE.

As proof that injury was caused by accident, 40, 231.

As basis of finding that accident arose out of and in the course of the employment, 70, 231.

That death was due to accident, 134.

See also EVIDENCE.

CITING CLAUSE.

Of English act, 129.

CLAIM FOR COMPENSATION.

Text of the English act requiring claim for compensation to be made, 83.

Construction of provisions relative to, 85.

Time within which claim must be made, 86.

CLEM v. CHALMERS MOTOR CO.

Decision in full, 352.

CLIMATE.

Injuries caused by unusual conditions of, as arising out of the employment, 43.

COMMITTEE.

Representative of the employer and his workmen, functions of, 177.

COMPENSATION RECOVERABLE.

Text of schedule I. of the English act, 129.

By dependents, 134, 253.

By injured employee, generally, 141-149, 254.

Recovery of compensation where action for damages has failed, 81-83.

COMPULSORY STATUTES.

Constitutionality of, 415.

CONCURRENT EMPLOYMENTS.

Consideration of wages from, in determining average weekly earnings, 152.

CONFINEMENT.

In prison, as terminating right to compensation, 31, 137.



## CONFLICT OF LAWS.

With reference to compensation acts, 443.

## CONJECTURE.

Finding of accident not to be based on mere, 40.

Finding that accident arose out of and in the course of the employment, not to be based on, 68.

## CONSTITUTIONAL LAW.

Constitutionality of workmen's compensation and industrial insurance statutes, 409.

## CONSTRUCTION.

Strict or liberal construction of American statutes, 215.

## CONTINUITY OF EMPLOYMENT.

As affecting average weekly earnings, 157.

## CONTRACT OF SERVICE.

What constitutes, under the English act, 114.

## CONTRACTORS.

Provisions of English act with reference to liability to servants of, 95.

Construction of provisions of English act relative to liability to servants of contractors, 95-97.

## CONTRACTS.

Right to contract out of statutes, 93, 227.

Termination of contracts relieving employer from liability, 128.

## CONTRIBUTIONS.

By other employers in cases of industrial diseases, 109.

## CONTRIBUTORY NEGLIGENCE.

Abrogation of defense of, as affecting validity of statute, 413.

Effect on defense of, of employer's failure to accept the provisions of the optional acts, 219.

## CONVEYANCE.

Injuries received while riding in forbidden conveyance, as arising out of and in the course of the employment, 55.

## COST OF MAINTENANCE.

Of minor child, as affecting amount of compensation for his death, 136.

## COSTS.

Allowance of, where workman's action at common law or under employer's liability act has failed, 82.

Allowance of, in compensation proceedings, 181.

Included in indemnity recoverable by employer against third person whose negligence caused the injury, 103.

## COUNTY COURT JUDGE.

As arbitrator, 177.

Appeal from decision of, 178.

## COURSE OF.

See ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

**COURT OF APPEAL.**

When appeals lie to, 100.

Appeals from decision of county court judge to, 178.

Limitation of the powers of, on appeal, 178, 179.

**COURTS.**

In which proceedings may be brought, 190.

**CROWN.**

Application of English act to workman under the Crown, 111.

**CUSTOM.**

Adoption of customary way of operating machine as serious or wilful misconduct, 244.

**DAM.**

As included in the word "mill" as used in the New Hampshire statute, 217.

**DAMAGES.**

Right of workman under English act, injured by negligence of the employer, to bring action for damages, 72-75.

Recovery of compensation where action for, has failed, 81-83.

**DANGEROUS.**

Injuries received while employee is taking dangerous method of performing his work, as arising out of the employment, 50.

**DEATH.**

Serious and wilful misconduct not bar to compensation where injury results in, 78.

Of sole dependent as entitling his representative to claim compensation, 135.

**DEATH RESULTS FROM INJURIES.**

Meaning of phrase, 132.

**DECLARATION OF LIABILITY.**

When may be made, 168-170.

**DE CONSTANTIN v. PUBLIC SERVICE COMMISSION.**

Decision in full, 329.

**DEDUCTIONS.**

To be made in estimating average weekly earnings, 158.

From award, 190.

**DEFENSES.**

Abrogation of common-law defenses as affecting validity of statutes, 413.

Common-law defenses of employer as affected by his failure to accept the provisions of the optional acts, 219.

**DEPENDENTS.**

Who are, in general, under the English act, 121-126.

Who are, within the meaning of the American statutes, 248.

Determination of question who are, 163.

Amount of compensation recoverable by, 134-136, 253.

Payment of compensation to, 162.

Election by workman to come in under the act as binding upon his dependents in case of his death, 222.



## DEPENDENTS—continued.

As "legal representative" under the New York act, 224.

Death of, as entitling representative to compensation, 135.

Review of cases on when husband and wife are living together within the meaning of the compensation act, 370.

## DISABLED FROM EARNING FULL WAGES.

When workman is, 72.

## DISABLEMENT.

See SERIOUS AND PERMANENT DISABLEMENT.

## DISEASE.

As an accident under the English act, 33-37.

As an accident or a personal injury within the meaning of the American acts, 228.

Intervention of, as excuse for failure to give notice of injury in time, 89, 92.

Intervention of, as affecting incapacity, 137.

Provisions relative to awarding compensation for industrial diseases in the English act, 106.

Recovery of compensation for industrial diseases under the English act.

In general, 108.

Meaning of phrase "at, or immediately before," 109.

Presumption as to cause of disease, 109.

Contribution by other employers, 109.

Functions of certifying surgeons and medical referee, 110.

Review of cases passing upon the question of recovery of compensation for incapacity resulting from disease, 289.

## DISFIGUREMENT.

Recovery of compensation because of, 256.

## DISPUTES.

Arbitration for settlement of, under the English act, 79-81.

## DISTRESS COMMITTEE.

Temporary employee of, as workman under the English act, 117.

## DIVISIONAL COURT.

When appeals lie to, 100, 112.

## DOCK.

As a factory, 203.

## DOMESTIC SERVANT.

Injuries received by, lying in bed, as arising out of the employment, 58.

## DRINK.

Injuries received while getting a drink as arising out of and in the course of the employment, 58.

## DROWNING.

Unexplained drowning of seaman as arising out of and in the course of his employment, 69.

As an accident within the meaning of the American statutes, 231.

## DRUGGIST.

Wholesale druggist as manufacturer of drugs and chemicals within meaning of New York act, 218.

**DUE PROCESS OF LAW.**

See CONSTITUTIONAL LAW.

**EARNINGS.**

Review of cases on consideration of possible earnings of injured employee in other employment in fixing compensation under compensation act, 371.

See also AVERAGE WEEKLY EARNINGS.

**ECZEMA.**

As accident, 35, 228.

**ELECTION.**

Right of, to workman under the English act injured by negligence of the employer, to bring proceedings under the act or to sue for damages, 72-74.

To come in under the optional statutes, 219.

**ELECTRICAL STATION.**

As a factory, 202.

**ELEVATOR.**

Injuries received while riding in, contrary to orders, as arising out of and in the course of the employment, 55.

**ELEVATOR OPERATOR.**

Who is, within the meaning of the New York act, 218.

When not within the protection of the Washington act, 219.

Recovery of compensation for injuries while employee is riding in, 56.

**EMPLOYEES.**

Amount of compensation recoverable by incapacitated employee under the American statutes, 254.

Review of cases on who are casual employees within the meaning of the workmen's compensation acts, 265.

See also WORKMEN.

**EMPLOYERS.**

Who are, under the English act, 113.

Who are, within the meaning of the American statutes, 245.

Prejudiced in his defense by failure to receive notice, 86.

Right of appeal from award of compensation by employer insured in state fund, 269.

**EMPLOYMENTS.**

To which the English acts of 1897 are applicable, 192.

To which American statutes are applicable, 216.

**ENGINEERING WORK.**

What constitutes, within meaning of English act of 1897, 208.

Meaning of phrase "on or in or about" when used in connection with, 195.

What constitutes "undertakers," in case of, 212.

**ENGLISH WORKMEN'S COMPENSATION ACT.**

Text of

Section 1, 29.

Section 2, 83.

Section 3, 93.

Section 4, 95.

Section 5, 98.



**ENGLISH WORKMEN'S COMPENSATION ACT—continued.****Text of**

- Section 6, 100.
- Section 7, 103.
- Section 8, 106.
- Section 9, 111.
- Section 10, 111.
- Section 11, 111.
- Section 12, 112.
- Section 13, 112.
- Section 14, 127.
- Section 15, 128.
- Section 16, 128.
- Section 17, 129.
- Schedule I. 129.
- Schedule II. 174.
- Schedule III. 108.
- Act of 1900, 191.
- Section 7 of the act of 1897, 192.

**ENTERITIS.**

- As accident, 35.

**EQUAL PROTECTION OF THE LAWS.**

- Compensation acts as violating constitutional provisions guarantying, 414.

**EVIDENCE.**

- Propriety of admission of hearsay evidence in proceedings before the Commission or trial court, 267.
- See also CIRCUMSTANTIAL EVIDENCE.

**EXAMINATION.**

- Duty of injured workman to submit to medical examination, 160.
- Obstruction of examination of injured workman, what constitutes, 161.

**EXCLUSIVENESS.**

- Of remedies furnished by American statutes, 223.

**EXCUSES.**

- For not giving notice of injury or making claim for compensation in time, 89.

**EXPOSURE.**

- Incapacity resulting from, as injury by accident, 36, 37.

**EXTRAHAZARDOUS EMPLOYMENTS.**

- What are, within the meaning of the New York statutes, 217.
- What are, under the Washington act, 218.

**EXTRATERRITORIAL EFFECT.**

- Of workmen's compensation acts, 443.

**EYE.**

- Compensation for loss of eye through infection, 234.
- Review of cases on recovery of compensation for loss of eye from infection, 326.

**FACTORY.**

- Meaning of, as used in English act of 1897.
- In general, 200.

**FACTORY**—continued.

- Premises wherein steam, water or other mechanical power is used, 200.
- Iron mills, 201.
- Premises wherein any manual labor is exercised by way of trade or for purposes of gain, 201.
- Premises in which manual labor is exercised in adapting an article for sale, 202.
- Ship building yards, 202.
- Bottle washing works, 202.
- Electrical station for lighting any street, public place, etc., 202.
- Dock, wharf, quay, 203.
- Warehouse, 206.
- Machinery used in the process of loading or unloading a ship, 207.
- Machinery temporarily used for the purpose of constructing a building, 208.
- What constitutes undertakers in case of, 209.
- Meaning of phrase "on, in or about" when used in connection with, 194.

**FALSE REPRESENTATION.**

- Making of, by infant in order to secure employment as serious and wilful misconduct, 78.

**FELLOW SERVANT.**

- Liability to indemnity where negligence of fellow workman causes injury, 102.
- Abrogation of defense of negligence of, as affecting validity of statute, 413.
- Effect of employer's failure to accept the provisions of the optional acts upon his right to rely upon the defense of the negligence of, 219.

**FIRST SCHEDULE.**

- Of English act, text of, 129.

**FISHERMEN.**

- When not within the provisions of the English act, 105.

**FLUME.**

- As included in the word "mill" as used in the New Hampshire act, 217.

**FOOD.**

- Injuries received while procuring, as arising out of the employment, 58, 237.
- Review of cases on injuries received while procuring food as arising out of and in the course of the employee's employment, 320.

**FOOTBALL PLAYERS.**

- As workmen under the English act, 116.

**FORTUITOUS.**

- Use of word in defining accident as misleading, 30.

**FRIENDLY SOCIETY.**

- Provisions relative to substitution of scheme approved by, for provisions of the act, 93, 94.

**FROSTBITE.**

- Injuries from, as arising out of the employment, 43.

**FULL WAGES.**

- When workman is not disabled from, 72.

**GAIN.**

- Premises wherein any manual labor is exercised for purposes of, as factory, 201.



## GAME KEEPER.

As within the protection of the act of 1900, 191.

## GAYNOR v. STANDARD ACCIDENT INSURANCE CO.

Decision in full, 363.

## GILLEN v. OCEAN ACCIDENT &amp; GUARANTEE CORP.

Decision in full, 371.

## GLASS.

What workman are engaged within the manufacture of, within the meaning of the New York act, 218.

## GOING TO AND FROM WORK.

Injuries received while employee is, as arising out of the employment, 60, 235.

Review of cases on recovery of compensation for injuries received while going to and from work, 331.

## GRADES OF EMPLOYMENT.

What constitutes, under English act, 150-152.

## GRADUATE IN SCIENCE.

As workman, under the English act, 115.

## GREAT WESTERN POWER CO v. PILLSBURY.

Decision in full, 281.

## GUESS.

Finding of accident not to be based on mere, 40.

Finding that accident arose out of and in the course of the employment not to be based on, 68.

## HEARSAY EVIDENCE.

Propriety of admission of, on hearing before Commission or trial court, 267.

## HEART DISEASE.

Death or incapacity from, as injury by accident, 33, 34.

## HEAT STROKE.

As accident, 38.

Death from, as result of accident, 34.

Injury from, as arising out of and in the course of the employment, 43.

## HERNIA.

As an accident, 32, 228.

Review of cases on hernia as an accident or personal injury within the meaning of the compensation acts, 303.

## HOENIG v. INDUSTRIAL COMMISSION.

Decision in full, 339.

## HOME.

Injuries received by employee while going to or from, as arising out of the employment, 60, 235.

Review of cases on recovery of compensation for injuries received while going to and from work, 331.

**HOPKINS v. MICHIGAN SUGAR CO.**

Decision in full, 310.

**HORSE PLAY.**

Injuries received while indulging in, as arising out of the employment, 47, 240.

**HORSE POWER.**

As mechanical power within the meaning of the English act of 1897, 201.

**HOSPITAL.**

Nurse or attendant in, contracting disease as suffering injury by accident, 36.

**HOTEL.**

Employee in kitchen of, as within protection of New York act, 218.

**HURLE, RE.**

Decision in full, 279.

**HUSBAND AND WIFE.**

Review of cases on when husband and wife are living together within the meaning of the compensation acts, 370.

**ICE.**

Work of harvesting ice not embraced within New York act, 217.

**ILLEGITIMATE CHILDREN.**

As dependents under the English act, 124.

**IMPLIED AGREEMENT.**

Registration of memorandum of, 184.

**IMPRISONMENT.**

As terminating right to compensation, 31.

As affecting incapacity for work, 137.

**INABILITY TO GET WORK.**

As embraced in expression "incapacity for work," 136, 255.

Review of cases on inability to get work because of injury as "incapacity for work," 380.

**INCAPACITY.**

Caused by accident, see ACCIDENT.

What constitutes generally, 136-141.

As affected by nervous and mental condition, 137.

As affected by intervention of disease, 137.

As affected by conviction of crime and imprisonment, 137.

Recovery of compensation because of, under the American statutes, 254.

Incapacity for work, as including inability to procure work, 255.

Review of cases on inability to get work because of injury as "incapacity for work," 380.

**INCAPACITY OF USE.**

Meaning of phrase as used in the Massachusetts act, 258.

**INCIDENTAL.**

What work is "ancillary or incidental" to the trade or business of the principal, 97.



**INDEMNITY.**

Employer's right to indemnity from third person whose negligence caused the injury, 102.

**INDEPENDENT CONTRACTORS.**

As workmen under the English act, 118.

As employees under the American statutes, 247.

**INDUSTRIAL DISEASE.**

See DISEASE.

**INFANTS.**

See MINORS.

**INFECTION.**

With anthrax as accident, 37.

With poison ivy, as an accident within the meaning of the New York act, 230.

Compensation for loss of eye through infection, 234.

Review of cases on recovery of compensation for loss of eye through infection, 326.

**INJURIES.**

Provisions of English act relative to report of, 112.

**INJURY BY ACCIDENT.**

See ACCIDENT.

**INSANITY.**

As affecting right of compensation, 234.

Death by suicide of insane workman as affecting right of dependent to compensation, 133.

Review of cases on applicability of compensation acts where insane workman commits suicide or suffers personal injuries, 339.

**INSURANCE COMPANY.**

Provisions for securing compensation where employer has become bankrupt or is being wound up, 99.

**INSURANCE FUNDS.**

Collection and maintenance of, 265.

**INTENTIONAL.**

Preservation of common-law remedy where injury is caused by intentional act of employer, 224.

**"IN THE COURSE OF OR FOR THE PURPOSES OF THE PRINCIPAL'S TRADE OR BUSINESS."**

When employment is, 96.

**INTOXICATION.**

Effect of, on recovery of compensation, 62, 238.

As serious and wilful misconduct under the English act, 78.

Review of cases on recovery of compensation where injured workman was intoxicated at the time of the injury, 351.

**IRON MILLS.**

As a factory within the meaning of the English act of 1897, 201.

**JENDRUS v. DETROIT STEEL PRODUCTS CO.**

Decision in full, 381.

**JENSEN v. SOUTHERN PACIFIC CO.**

Decision in full, 403.

**JOINT LIABILITY.**

Of employer and third person whose negligence caused the injury, 101.

**JURISDICTION.**

Question as to jurisdiction of Commission or trial court, as question of law, 269.

**KENNERSON v. THAMES TOWBOAT CO.**

Decision in full, 436.

**KENTUCKY STATE JOURNAL CO. v. WORKMEN'S COMPENSATION BOARD.**

Decision in full, 389.

**KLAWINSKI v. LAKE SHORE & MICHIGAN SOUTHERN R. CO.**

Decision in full, 342.

**LADDERS.**

As scaffolding within the meaning of the English act of 1897, 199.

**LAND.**

Injury to sailor while on, as arising out of the employment, 65.

**LAW WRITERS.**

As workmen under the English act, 116.

**LEAD POISONING.**

As an accident under the English act, 35.

As an accident within the meaning of the Michigan and Massachusetts acts, 228.

**LEGAL REPRESENTATIVES.**

Meaning of the phrase as used in section 10 of the New York act, 224.

**LETTERS OF ADMINISTRATION.**

Need not be taken out as condition precedent to receiving compensation, 163.

**LIBERAL CONSTRUCTION.**

Of American statutes, 215.

**LIGHTNING.**

Death or injury by, as arising out of the employment, 43, 241.

Review of cases on compensation for injuries by, 347.

**LIGHT WORK.**

Duty of employee to use efforts to procure light work to do, 145.

Duty of employer to furnish light work to injured employee, 145-147.

As grade of employment, 151.

**LIQUIDATION.**

Provisions for securing compensation where corporate employer has gone into liquidation, 99.



**LOADING.**

Machinery used in the process of loading a ship as a factory, 207.

**LOBAR PNEUMONIA.**

As an accident within the meaning of the Massachusetts act, 229.

**LODGING.**

Furnished to workman, consideration to be given to, in fixing average weekly earnings, 159.

**LONG SHORE WORK.**

Application of New York act to, 217.

**LORD CAMPBELL'S ACT.**

Action under, as action within meaning of section 1, subsection 4, of the English act, 82.

**LOSS.**

Of a member, what constitutes within the meaning of the Wisconsin act, 258.

**LUMBERMAN.**

Not within provisions of Quebec act, 117.

**LUMP SUM.**

Redemption of weekly payments by, 172, 173.

Agreements as to, 189.

Commutation of weekly payments by payment of, 262.

**MCCOY v. MICHIGAN SCREW CO.**

Decision in full, 323.

**McNICOL, RE.**

Decision in full, 306.

**MACHINERY.**

Injuries from, to employees not engaged to work around, as arising out of the employment, 48, 55.

Temporarily used for the purpose of constructing a building as a factory, 208.

Used in the loading or unloading of a ship as a factory, 207.

**MANUAL LABOR.**

Workman need not necessarily be engaged in, 115.

Premises in which manual labor is exercised in adopting articles for sale, as a factory, 202.

Premises wherein manual labor is exercised by way of trade or for purposes of gain, as a factory, 201.

**MASSAGE.**

Duty of injured workman to undergo, 139.

**MEAT MARKET.**

Employees in, as within the protection of New York act, 218.

**MECHANICAL POWER.**

Premises wherein steam, water or other mechanical power is used as a factory, 200.

**MEDICAL EXAMINATION.**

Duty of injured workman to submit to, 160.

**MEDICAL REFEREE.**

Reference to, 190.

Functions of, with reference to industrial diseases, 110.

Provisions of the English act relative to the appointment and remuneration of, 111.

**MEDICAL SERVICE.**

Allowance for, under American statutes, 261.

**MELLEN LUMBER CO. v. INDUSTRIAL COMMISSION.**

Decision in full, 374.

**MEMBER.**

Loss of, what constitutes, 258.

**MEMORANDUMS OF AGREEMENT.**

Registration of, 184.

**MILL.**

Scope of trade as used in the New Hampshire act, 217.

**MILLIKEN v. TRAVELERS INSURANCE CO.**

Decision in full, 337.

**MILWAUKEE v. ALTHOFF.**

Decision in full, 327.

**MINE.**

Injuries received while riding in a tub in a mine, contrary to orders, as arising out of and in the course of the employment, 55.

What constitutes within meaning of English act of 1897, 209.

Meaning of phrase "in or on or about" used in connection with, 195.

**MINE MANAGER.**

As workman under the English act, 115.

**MINORS.**

False representation as to age by, in order to secure employment, as serious and wilful misconduct, 78.

As employers under the English act, 113.

As dependents, 122.

Parent as dependent upon the support of minor child, 251.

Computation of average weekly earnings of, 149.

Right of parent where minor employee is injured, 224.

**MISCONDUCT.**

See **SERIOUS AND WILFUL MISCONDUCT.**

**MUNICIPALITIES.**

As employers under the Illinois act, 245.

**MUSIC TEACHER.**

As workman under the English act, 116.



**NEGLIGENCE.**

- Injuries received while employee is acting negligently as arising out of the employment, 50, 238.
- Effect of negligence on part of master or employer to give employee right of action for damages under the English act, 72-75.
- Preservation in American acts of common-law right of action where injury is caused by wilful or intentional act of employer, 224.
- Recovery of compensation where an injury was caused by the negligence of a third person, 100.
- Rights and remedies under American statutes where negligence of third person causes the injury, 225.
- Review of cases on rights and remedies under compensation acts where injuries were caused by negligence of third person, 360.

**NEKOOSA-EDWARDS PAPER CO. v. INDUSTRIAL COMMISSION.**

Decision in full, 348.

**NERVOUS CONDITION.**

As affecting incapacity for work, 137.

**NERVOUS SHOCK.**

As accident, 31.

**NONRESIDENT ALIEN DEPENDENTS.**

As within the protection of the compensation statutes, 126, 251.

**NORTHWESTERN IRON CO. v. INDUSTRIAL COMMISSION.**

Decision in full, 366.

**NOTICE.**

- Text of English act requiring notice of the accident to be given, 83.
- General provisions relative to the giving of notice of the accident, 83.
- Form and contents of, 84.
- To whom notice may be given, 85.
- Excuses for not giving notice or making claim for compensation in time, 89.
- Requirements as to giving notice under American statutes, 247.

**NURSE.**

- Contracting disease in hospital, as suffering injury by accident, 36.
- Allowance for expenses for services of, under American statutes, 262.

**OCCUPATIONAL DISEASE.**

See DISEASE.

**OCCUPATIONS.**

- To which the English act of 1897 was applicable, 192.
- To which American acts are applicable, 216.

**ON OR IN OR ABOUT.**

- Meaning of the phrase.
  - In general, 193.
  - When used in connection with a railroad, 193.
    - with a factory, 194.
    - with a mine, 195.
    - with engineering work, 195.
    - with the premises on which the principal has undertaken to execute the work, 196.

OPERATION.

Duty of injured workman to undergo, 139, 259.

Review of cases on refusal of injured workman to have operation performed as bar to compensation, 387.

OPTIC NEURITIS.

As a personal injury within the meaning of the Massachusetts act, 229.

OPTIONAL STATUTES.

Election to come in under, 219.

ORDERS.

Injuries received while acting contrary to, as arising out of the employment, 52.

Violation of, as serious and wilful misconduct under the English act, 76.

Injuries received while obeying express orders of superior as arising out of and in the course of the employment, 62, 239.

OUT OF.

See ARISING "OUT OF AND IN THE COURSE OF" THE EMPLOYMENT.

OVEREXERTION.

Sprain from, as accident, 32.

OVERWORK.

General breakdown from, as accident, 36.

PARENT.

Right of, under compensation act, where minor employee is injured, 224.

As dependent of earnings of minor child, 251.

PARTIES INTERESTED.

Who are, within the meaning of schedule II., paragraph 9, 187.

PARTNERSHIP.

Member of, not employee of partnership, 117.

PAYMENTS.

Of compensation as waiver of right of employer to insist on the giving of notice of injury, 92.

Consideration of payments received by workman from employer during period of incapacity, 148.

Review of, 163.

PEET v. MILLS.

Decision in full, 358.

PENDAR v. H. & B. AMERICAN MACHINE CO.

Decision in full, 428.

PENNY A WEEK.

Award of, 168.

PERIOD OF EMPLOYMENT.

Forming basis for computation for average weekly earnings, 155.

PERMANENT DISABLEMENT.

See SERIOUS AND PERMANENT DISABLEMENT.



**PERSONAL BELONGINGS.**

Recovery of compensation for injuries received while trying to save personal belongings, 237, 322.

**PERSONAL INJURY.**

Scope of phrase as used in American statutes, 227.

**PERSONAL INJURY BY ACCIDENT.**

See ACCIDENT.

**PERSONAL REPRESENTATIVE.**

Death of dependent as entitling personal representative to compensation, 135.

Election of workman to come in under the act, as binding upon his personal representatives in case of his death, 222.

Option of employee to accept or reject Arizona act not open to, 223.

**POCCARDI v. PUBLIC SERVICE COMMISSION.**

Decision in full, 299.

**POISON IVY.**

Infection from, as an accident within the meaning of the New York act, 230.

**POLICEMAN.**

As workman under the English act, 117.

**POSTHUMOUS CHILD.**

As dependent under the English act, 124.

**PRACTICE.**

Under the American statutes, in general, 271.

**PREJUDICE.**

Employer prejudiced in his defense by failure of employee to give notice of the injury, 86.

**PREMISES ON WHICH THE PRINCIPAL HAS UNDERTAKEN TO EXECUTE WORK.**

What are, 97.

**PRESUMPTION.**

As the cause of industrial disease, 109.

As to the dependency of the members of the workman's family, 122.

As to the dependency of near relatives, 250.

**PRINCIPAL.**

See CONTRACTOR.

**PRISON.**

Confinement in, as terminating right to compensation, 31.

Confinement in, as affecting incapacity, 137.

Inmates of, as dependents under the English act, 125.

**PROCEDURE.**

In action by employer against third person whose negligence caused the injury, 103.

Under the American statutes, in general, 271.

**PROFITS.**

Sharing in, as affecting status of workman generally, 117.

Sharing in, as barring member of crew of fishing vessel from compensation, 105.

Consideration of profits in business undertaken by injured workman in estimating what he is able to earn after the injury, 144.

Made by workman, consideration to be given to, in fixing average weekly earnings, 160.

**PROOF.**

See BURDEN OF PROOF.

**PTOMAIN POISONING.**

As accident, 35.

**PUBLIC BODIES.**

As employers under the English act, 113.

**QUAY.**

As a factory, 203.

**QUEBEC.**

Who are dependents under the act of, 127.

**QUESTIONS OF FACT.**

Jurisdiction of court of appeal over, 179.

**RAILROAD.**

Meaning of phrase "on, in or about" used in connection with, 193.

Meaning of, as used in English act of 1897, 200.

When employees of, are under protection of New York act, 217.

**RECEIVERS.**

As employers under the American statutes, 245.

**RECERTIFICATION OF SCHEME.**

Provisions of English act relative to, 128.

**RECTIFICATION.**

Of register, 188.

**REDEMPTION.**

Of weekly payments by payment of lump sum, 172, 173.

**REFERENCE.**

To medical referee, 190.

**REFRESHMENTS.**

Review of cases on injuries received while procuring refreshments, as arising out of and in the course of the employee's employment, 320.

**REGISTER.**

Rectification of, 188.

**REGISTRATION.**

Of memorandums of agreement, 184.



**REITHAL, RE.**

Decision in full, 304.

**REMEDIES.**

Alternative remedies furnished to workmen or dependents under the English act, 72.

Under the American statutes, 223.

Exclusiveness of remedy furnished by American statutes, 223.

**REMUNERATION.**

Of arbitrators and referees under the English act, 111.

**REPEALING CLAUSE.**

Of English act, 128.

**REPORT.**

Provisions of English act relative to report of injuries, 112.

**REPRESENTATIVE.**

See **PERSONAL REPRESENTATIVE.**

**REQUIREMENTS OF NATURE.**

Injuries received while going to satisfy, as arising out of the employment, 46.

**RESCUE.**

Injuries received while attempting to rescue fellow workman as arising out of the employment, 238.

**RETROACTIVE EFFECT.**

Of American statutes, 216.

**REVIEW.**

Of weekly payments under the English act, 163.

Of decisions of the Commission or trial court under American statutes, 266.

**REYNOLDS v. DAY.**

Decision in full, 432.

**RULES.**

Injuries received while acting contrary to, as arising out of the employment, 52.

Violation of, as serious and wilful misconduct under the English act, 76.

**RUPTURE.**

As an accident, 32, 228.

**SAILORS.**

Injuries to, while on shore, as arising out of and in the course of the employment, 65.

**SALESMAN.**

As workman under the Manitoba statute, 116.

**SCAFFOLDING.**

Meaning of phrase as used in English act of 1897, 198.

**SCHEDULE.**

Text of first schedule of English act, 129.

Text of second schedule of English act, 174.

Text of third schedule of English act, 108.

**SCHEME.**

Substitution of scheme approved by friendly society for provisions of the act, 93, 94.  
 Recertification of, entered into under act of 1897, 128.

**SCOPE OF EMPLOYMENT.**

See ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

**SCOTLAND.**

Who are dependents in, 125.  
 Provisions of English act relative to Scotland only, 191.

**SEAMAN.**

Unexplained drowning of, as death from accident, as arising out of and in the course of the employment, 69.  
 As not within the protection of the English act of 1907, 120.

**SEA SERVICE.**

Provisions of English act relative to application of act to workmen in the sea service, 103.  
 Recovery of compensation by workmen in sea service, 104, 105.

**SECOND SCHEDULE.**

Of English act, text of, 174.

**SECURITY FOR COSTS.**

Practice relative to, 183.

**SERIOUS AND PERMANENT DISABLEMENT.**

Serious and wilful misconduct not bar to compensation where injury results in, 78.

**SERIOUS AND WILFUL MISCONDUCT.**

What constitutes under the English act, 75-79.  
 What constitutes under the American acts, 243.  
 Review of cases on what constitutes serious and wilful misconduct within the meaning of the compensation acts, 355.

**SERVICE.**

What constitutes contract of, 114.

**SET-OFF.**

Against weekly payments, 174.

**SHARING PROFITS.**

As barring a member of the crew of the fishing vessel from right to compensation, 105.

**SHIPBUILDING YARD.**

As a factory, 202.  
 When workmen employed in, are not excluded from provisions of English act, 213.

**SHIPS.**

Detention of ships whose owners are liable for compensation, provisions of the English act relative to, 111.  
 In a dock as a factory, 203.  
 Machinery used in the process of loading or unloading, as a factory, 207.

**SHOCK.**

Nervous shock as accident, 31. 16



**SHORE.**

Injuries to sailor while on, as arising out of the employment, 65.

**SICKNESS.**

Absences from work because of, as affecting average weekly earnings, 152-155.

**SPONATSKI, RE.**

Decision in full, 333.

**SPORT.**

Injuries received while acting in, as arising out of and in the course of the employment, 47, 240.

Incapacity resulting from sportive acts, as an accident, 231.

**STATE EX REL. JARVIS v. DAGGETT.**

Decision in full, 446.

**STATE EX REL. PEOPLE'S COAL & ICE CO. v. DISTRICT COURT.**

Decision in full, 344.

**STATUTES.**

Constitutionality of workmen's compensation and industrial insurance statutes, 409.

See also **ENGLISH WORKMEN'S COMPENSATION ACT.**

**STEAM.**

Premises wherein steam, water or other mechanical power is used as a factory, 200.

**STOCKER.**

Receiving share of, as barring member of crew of fishing vessel from compensation, 105.

**STORMS.**

Injuries received while seeking shelter from, as arising out of and in the course of the employment, 236.

**STRAIN.**

Resulting from overexertion as accident, 32.

**STREET.**

Injuries upon, as arising out of the employment, 41, 233.

Review of cases on recovery of compensation for injury to employee received while on the street, 314.

**STRICT CONSTRUCTION.**

Of American statutes, 215.

**STRIKE BREAKERS.**

As forming a grade of employment, 151.

**SUBCONTRACTORS.**

Liability of, to indemnify principal contractors who have been obliged to pay compensation for injuries to subcontractor's employees, 96.

**SUICIDE.**

By insane workman as affecting right of dependents to compensation, 133, 234.

As wilful misconduct, 244.

Review of cases on applicability of compensation acts where insane workman commits suicide or suffers personal injury, 339.

**SULLIVAN, RE.**

Decision in full, 378.

**SUNDINE, RE.**

Decision in full, 318.

**SUNSTROKE.**

As accident, 38.

Injuries from, as arising out of the employment, 43.

**SUPERIOR.**

Injuries received while obeying orders of, as arising out of and in the course of the employment, 62.

**SURGEONS.**

See CERTIFYING SURGEON.

**SURMISE.**

Finding of accident not to be based on mere, 40.

Finding that accident arose out of and in the course of the employment not to be based on, 68.

**SUSPENSORY AWARD.**

When may be made, 168.

**SYDNEY HARBOR TRUST COMMISSIONERS.**

As employers, 113.

**TAXICAB DRIVER.**

As bailee and not workman, 117.

**TERMINATION OF PAYMENTS.**

When payments may be terminated, 166.

**TEXT.**

Of English workmen's compensation act, see ENGLISH WORKMEN'S COMPENSATION Act.

**THIRD PERSON.**

Provisions of English act where negligence of third person causes the injury, 100.

Recovery of compensation where injury is caused by negligence of, 101, 223.

Employer's right to indemnity from third person whose negligence caused the injury, 102.

Review of cases on rights and remedies under compensation act where injuries were caused by negligence of, 360.

**THIRD SCHEDULE.**

Of English act, text of, 108.

**THRESHING.**

As agricultural work within the meaning of the English act of 1900, 191.

**TIME.**

For appeal from award of the arbitrator, 178.

**TIPS.**

Consideration to be given to, in estimating average weekly earnings, 159.



**TITLE.**

Validity of statute as affected by title, 411.

**TOILET FACILITIES.**

Injuries received while seeking, as arising out of and in the course of the employment, 46, 236.

Review of cases on injuries received while seeking toilet facilities as arising out of the employment, 317.

**TRADE.**

What employment is "in the course of or for the purposes of" the principal's trade, 96.

What work is "ancillary or incidental" to the trade or business of the principal, 97.

Premises wherein any manual labor is exercised by way of, as factory, 201.

**TRADE HOLIDAYS.**

As affecting average weekly earnings, 152-155.

**TRADE UNION.**

Right to bring proceeding in workman's name, 188.

**TRADE WEEKS.**

Use of, in determining average weekly earnings, 156.

**TRAIN.**

Injuries while getting on or off moving train, as arising out of the employment, 49.

Injuries received while riding on a train, contrary to orders, as arising out of and in the course of the employment, 55.

**TRUCK.**

When employee is engaged in operation of, within meaning of New York act, 218.

**TUB.**

Injuries received while riding in a tub in a mine contrary to orders as arising out of and in the course of the employment, 55.

**TYPHOID FEVER.**

As accident, under the English act, 35.

As an accident within the meaning of the Wisconsin act, 229.

**UNDERTAKEN BY THE PRINCIPAL.**

When work is, 97.

**UNDERTAKERS.**

What constitutes.

In case of a factory, 209.

In case of engineering work, 212.

**UNLOADING.**

Machinery used in the process of unloading a ship, as a factory, 207.

**VARYING OF THE AWARD.**

Power of arbitrator to, 163.

**VENNEN v. NEW DELLS LUMBER CO.**

Decision in full, 273.

**VESSELS.**

See SHIPS.

**VIOLENCE.**

Injuries caused by violence of third persons, as accident, 31.

**WAIVER.**

By employer of right to insist upon notice of the injury, 92.

**WAREHOUSE.**

As a factory, 206.

Scope of word as used in New York act, 218.

**WATER.**

Premises wherein steam, water or other mechanical power is used as a factory, 200.

**WATER MAINS.**

Maintenance of, as maintenance of a structure within the meaning of the Illinois act, 217.

**WEATHER.**

Injuries caused by unusual conditions of, as arising out of the employment, 43.

**WHARF.**

As a factory, 203.

**WIDOW.**

Dependency of, 122, 250.

**WIFE.**

As a dependent, 122, 250.

See also HUSBAND AND WIFE.

**WILFUL.**

Preservation of common-law remedy where injury is caused by wilful act of employer, 224.

**WILFUL MISCONDUCT.**

See SERIOUS AND WILFUL MISCONDUCT.

**WINDING UP.**

Text of English act relative to winding up of corporate employer, 98.

Securing compensation where corporate employer is being wound up, 99.

**WINDOW WASHERS.**

As workmen under the English act, 120.

**WORK.**

Injuries while going to or from work as arising out of and in the course of the employment, 68, 235.

Review of cases on recovery of compensation for injuries received while going to and from, 331.

**WORKHOUSE.**

Inmates of, as dependents under the English act, 125.



**WORKMEN.**

Who are, under the English act.

In general, 115.

Independent contractors, 118.

Casual employees, 120.

Seamen, 120.

Status as workmen as dependent upon amount of remuneration received, 121.

Who are employees or workmen under the American statutes.

In general, 246.

Independent contractors, 247.

Casual employees, 247.

Amount of compensation recoverable by incapacitated workman, 136-160, 365.

See also EMPLOYEES.

**WRITING.**

Notice of injury to be in, 84.

**ZABRISKIE v. ERIE R. CO.**

Decision in full, 315.

**ZAPPALA v. INDUSTRIAL INSURANCE COMMISSION.**

Decision in full, 295.

















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